The Public's Right of Access to Pretrial Proceedings Versus The Accused's Right to a Fair Trial

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Introduction

In *Press-Enterprise Co. v. Superior Court of California*[1] (*Press-Enterprise II*), the United States Supreme Court held that the closure of a preliminary hearing in a highly publicized criminal prosecution, as requested by the defendant, infringes on the First Amendment right of the press and the public to have access to the criminal trial process. In so doing, the Court tacitly reversed its prior holding in *Gannett Co. v. DePasquale*[2] that there is no constitutional requirement "that a pretrial proceeding such as [a pretrial suppression hearing] be opened to the public, [when] the participants in the litigation agree that it should be closed to protect the defendants' right to a fair trial."[3] Thus, the Court's decision in *Press-Enterprise II* has severely diluted a criminal accused's ability to persuade a trial judge to restrict press and the public access to pretrial proceedings in order to attenuate prejudicial pretrial publicity.

In a recent case, the United States Court of Appeals for the Armed Forces[4] (CAAF) adopted the *Press Enterprise II* doctrine on press and public access to pretrial proceedings.[5] The CAAF invoked its extraordinary writ power[6] and ordered that the Article 32 investigation[7] in the case of former Sergeant Major of the Army Gene C. McKinney be open to the press and the public.[8]

This article discusses the line of United States Supreme Court cases that address open versus closed pretrial and trial proceedings. The article then details how the CAAF has adopted and applied the Supreme Court's doctrine to courts-martial. Finally, the article poses a scenario in which a defense counsel in a military prosecution is compelled to move for closure of a pretrial proceeding.

Sergeant Major McKinney joined the press in applying for a writ of mandamus to open his Article 32 hearing. However, open pretrial proceedings are not always in an accused's interest. Often, the accused will ask that a pretrial proceeding that is the subject of press or public scrutiny be closed, because evidence that is prejudicial to the accused will be aired prior to a

1. 478 U.S. 1 (1986).

2. 443 U.S. 368 (1979).

3. *Id.* at 385.

4. On 5 October 1994, Congress changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces (CAAF). *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (codified at 10 U.S.C.A. § 941 (West 1998)).

5. *See infra* notes 122-31 and accompanying text.

6. The CAAF and the service courts of criminal appeals, as "courts established by an act of Congress," have the authority to entertain petitions for, and to "issue[,] all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the uses and principles of law." 28 U.S.C.A. § 1651(a) (West 1998).

7. Under Article 32 of the Uniform Code of Military Justice, a court-martial case cannot be referred to a general court-martial unless an investigating officer has first conducted a "thorough and impartial" pretrial investigation to determine, inter alia, whether there is a sufficient factual basis for the charge or charges. *See* UCMJ art 32 (West 1995). The accused has the right to be present with counsel at the investigation, to cross-examine government witnesses, and to call witnesses on his own behalf. *Id.*

8. *See* ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997). The requirement in 28 U.S.C.A. § 1651(a) that writs be "necessary and appropriate in aid of " a federal court's jurisdiction appears to limit the extraordinary writ power of the CAAF and the service courts of criminal appeals to cases that are already referred to military courts-martial, since the only issues which will come before those military appellate courts by the statutory appellate process will arise from trials by courts-martial. *See* 28 U.S.C.A. § 1651 (West 1998). However, the CAAF and the service courts of criminal appeals have asserted and established their power to entertain petitions for, and to issue, extraordinary writs in military justice proceedings which have not yet reached the stage of referral to a military court-martial. These courts have reasoned that even cases in the pre-referral stage may potentially reach the military appellate courts. *See, e.g.*, San Antonio Express News v. Morrow, 44 M.J. 706, 708-09 (A.F. Ct. Crim. App. 1996) (holding that extraordinary writ power extends to all "tiers" of the military justice process, including pre-referral investigations under Article 32). In the case of Sergeant Major McKinney, the CAAF tacitly assumed that its extraordinary writ power extended to the Article 32 investigation. The court did not discuss the issue. *See ABC*, 47 M.J. at 364 (addressing whether a writ should first be considered by Army Court of Criminal Appeals, not whether extraordinary writ power extends to pre-referral proceedings such as an Article 32 investigation).

trial before members. The scenario that is posed in this article demonstrates how the prevailing standard which promotes press and public access to pretrial proceedings tends to unduly prejudice the accused. Indeed, the prevailing standard virtually mandates open proceedings at all stages of the criminal process, even though prejudicial pretrial publicity is bound to result. The prevailing standard should be modified to strike a reasonable balance between the First Amendment right of public access and the accused's right to a fair trial.

The United States Supreme Court and Public Access to Criminal Proceedings

The Accused's Right to Seek Closure of a Pretrial Proceeding

In 1979, the United States Supreme Court made its first pronouncement on the issue of press and the public access to pretrial criminal proceedings. In *Gannett Co. v. DePasquale*,[9] two co-defendants in a New York state murder prosecution moved to suppress statements that they had made to the police and the physical evidence that was seized as a result of those statements, including the murder weapon.[10] The co-defendants, concerned that the statements or their contents and the resulting physical evidence might come to the attention of potential jurors, moved that the suppression hearing be closed to the press and the public.[11] The prosecutor did not oppose the closure motion, and the trial judge closed the suppression hearing. Members of the press, however, protested and sought a hearing before the judge.[12] The judge made an explicit finding that "an open suppression hearing would pose a reasonable probability of prejudice to these defendants . . . [and therefore] the interest of the press and the public was outweighed in this case by the defendants' right to a fair trial."[13] Although the suppression hearing had already taken place, the judge denied the press and the public access to the transcript of the hearing until after the defendants' trials were concluded.[14] The United States Supreme Court upheld the trial judge's closure of the suppression hearing.

The Plurality in Gannett

A four-justice plurality held that the press and the public do not have standing under the Sixth Amendment to demand a public trial.[15] While a criminal defendant cannot receive a closed trial on demand, if "the participants in the litigation agree that it should be closed to protect the defendants' right to a fair trial," no one else has standing to protest.[16] In the alternative, the four justices held that, if a public Sixth Amendment right to an open trial exists, the right of access does not apply to pretrial proceedings.[17] The justices discussed the common law of public access at the time of the adoption of the Sixth Amendment and they opined that no common law right of public access to pretrial proceedings existed at that time.[18] The justices also observed that, historical considerations aside, "the entire purpose of a pretrial suppression hearing is to ensure that the accused will not be unfairly convicted by contaminated evidence."[19] Therefore, keeping potentially inadmissible evidence out of public circulation by closing pretrial proceedings is a reasonable means of promoting the right of the accused to a fair trial.[20]

The four justices refused to decide whether the press and the public possessed a First Amendment right of access to pretrial proceedings.[21] They noted that, if such a right existed, the trial judge had properly balanced that right against the defendants' right to a fair trial and had correctly found that the defendants' right prevailed.[22]

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9. 443 U.S. 368 (1979).

10. *Id.*

11. *Id.*

12. *Id.* at 374-76.

13. *Id.* at 376.

14. *Id.* at 376 & n.4.

15. *Id.* at 379.

16. *Id.* at 385-86.

17. *Id.* at 387.

18. *Id.* at 387-91.

19. *Id.* at 389 n.20.

20. *Id.*

21. *Id.* at 392.

The four justices held that the trial court's balancing of interests had not been necessary.[23] The interests that were otherwise secured by trial publicity were equally protected by the operation of the adversary process in a closed hearing. The defendants moved to close the hearing, and their counsel represented them zealously in the closed suppression hearing, even in the absence of spectators.[24] The plurality further observed that a trial judge has an overriding responsibility to maintain the integrity of the criminal adjudicative process, rather than to accommodate the press and the public. "[A] trial judge has *an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.* Because of the Constitution's pervasive concern for these due process rights, a trial judge may *take protective measures even when they are not strictly and inescapably necessary.*"[25] The plurality noted that, when information that is later suppressed is publicized during a pretrial hearing, it can always reach potential jurors, with effects that could be prejudicial to the accused.[26] The four justices further stated that "[c]losure of pretrial proceedings is one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun."[27]

The Concurrence in Gannett

Justice Powell added a fifth and deciding vote to uphold the closure order of the trial judge. Justice Powell found that there was a First Amendment right of public and press access that applied to criminal proceedings generally, and to pretrial suppression hearings in particular.[28] Because suppression hearings are often dispositive of a case, "the public's interest in this proceeding often is comparable to its interest in the trial itself."[29] Justice Powell, however, found that the trial judge had closed the hearing based on the appropriate standard.

> The question for the trial court . . . in considering a motion to close a pretrial suppression hearing is whether a fair trial for the defendant is *likely to be jeopardized* by publicity, if members of the press and the public are present and free to report prejudicial evidence that will not be presented to the jury.[30]

The Dissent in Gannett

In the dissent, four justices opined that the press and the public had standing to oppose the closure of criminal proceedings under the Sixth (rather than the First) Amendment.[31] In their view, this public right of access under the Sixth Amendment's public trial clause applied to both pretrial suppression hearings and proceedings on the merits.[32] The dissenters noted that pretrial hearings are often dispositive of cases[33] and that "suppression hearings typically involve questions concerning the propriety of police and government conduct that took place hidden from the public view."[34] The public has an interest in the airing of this law enforcement conduct.[35]

According to the dissenting opinion, the trial judge failed to apply the appropriate standard in balancing the public's right of access against the defendant's right to attenuate prejudicial pretrial publicity. The dissenters believed that the trial judge's standard was weighted too heavily against the public's right to access the proceeding. They opined that a trial judge could close a pretrial suppression hearing, or any criminal trial pro-

22. *Id.* at 391-93.

23. *Id.* at 393.

24. *Id.* at 382-84.

25. *Id.* at 378 (citation omitted) (emphasis added).

26. *Id.* at 378-79.

27. *Id.* at 379.

28. *Id.* at 397-98 & n.1.

29. *Id.* at 378 n.1.

30. *Id.* at 400 (emphasis added).

31. *Id.* at 432-33.

32. *Id.* at 436.

33. *Id.* at 434.

34. *Id.* at 435.

35. *Id.*

ceeding, only when such closure is "*strictly and inescapably necessary* in order to protect the fair-trial guarantee."[36] The burden, therefore, is on the defendant to show that an open hearing will "irreparably damage" the right to a fair trial and that all alternatives short of closure are inadequate.[37] In contrast, the public or the press is not required to show why access serves any particular public interest. In fact, when the accused moves to close a proceeding, the public and the press need not demand access at all. The strict presumption against closure applies regardless of any protests or actions by the press or the public.[38]

The dissenters noted that the issues that are litigated in suppression hearings typically do not concern the contents or nature of the statements or the objects that the defendant moves to suppress.[39] Rather, suppression hearings generally focus on how law enforcement obtained the statements or objects. Therefore, there usually would be ample alternatives to closure. For example, the parties could openly litigate police procedures while taking care not to disclose the contents of the evidence obtained or seized.[40]

The Court Defines a First Amendment Right of Access to Criminal Proceedings

An Extreme Case Spawns a New First Amendment Right

In 1980, one year after deciding *Gannett*, the Supreme Court faced the "worst case" scenario of criminal trial closure. In *Richmond Newspapers, Inc. v. Virginia*,[41] the defendant moved to close the trial on the merits without making any showing that his interests in a fair trial outweighed the public interest in access to the trial. The prosecutor did not oppose the motion, and the trial judge closed the entire trial to the press and the public.[42] The trial judge later denied a motion from representatives of the press to reverse the ruling; no findings were made as to whether closure was necessary to protect the defendant's right to a fair trial.[43] In the closed trial, the judge (who had presided over two of the defendant's three previous trials for the same offense[44]) granted a motion for a finding of not guilty at the close of the commonwealth's case and discharged the defendant from custody.[45]

The New First Amendment Right

Faced with these extreme facts, the United States Supreme Court (by a vote of seven justices to one)[46] held, for the first time, that the press and the public have a First Amendment right of access to criminal trial proceedings. Three justices limited this right of access to the trial on the merits, rather than *all* criminal proceedings.[47] "[T]he First Amendment guarantees of speech and press, standing alone, prohibit [the] government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."[48]

The four justices who dissented in *Gannett* concurred. They agreed that the public's Sixth Amendment right of access to pretrial suppression hearings was equally a First Amendment

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36. *Id.* at 440 (emphasis added).

37. *Id.* at 441-42.

38. *Id.* at 443.

39. *Id.* at 442.

40. *Id.* In 1996, a military judge detailed to Fort Bragg, North Carolina, applied this principle in a highly publicized death penalty case. The parties litigated motions to suppress but withheld contents of the statements at issue from the media. Only the details of how law enforcement obtained the statements were aired in open court. Interview with Major Jack Einwechter, seminar course, Analysis of the Military Criminal Justice System, 45th Graduate Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia (1997).

41. 448 U.S. 555 (1980).

42. *Id.* at 559-60.

43. *Id.* at 560-61.

44. *Id.* at 560. The defendant's initial conviction for murder had been reversed because of improperly admitted evidence. His second trial ended in a mistrial after a juror sought and obtained excusal and no alternate was available. A third trial ended in a mistrial after a prospective juror infected the jury pool by discussing newspaper accounts of the previous trials with his fellow veniremen. *Id.* at 559.

45. *Id.* at 561-62.

46. Only Justice Rehnquist dissented. *See id.* at 604-06. Justice Powell, who had authored the decisive concurring opinion in *Gannett Co. v. DePasquale*, did not participate in the consideration or decision of the case. *See id.* at 581.

47. *Id.* at 576.

48. *Id.*

right.[49] In their view, however, that right applied equally to the trial on the merits and to pretrial proceedings.[50]

Right of Access Distinct from Right of Free Expression: Justice Stevens' Concurrence

In a concurring opinion, Justice Stevens carefully distinguished the type of First Amendment right of *access* at issue in *Richmond Newspapers* from the traditional First Amendment right of *free expression*. Justice Stevens wrote:

> This is a watershed case. Until today, the Court has afforded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.
> . . . [T]oday, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.[51]

Because the trial judge in the *Richmond Newspapers* case had closed the entire trial rather than just an ancillary proceeding, and because he had failed to make any findings that would justify closure, the justices found it unnecessary to agree on a standard for closure.[52] However, Justice Stevens argued that, if the First Amendment right of access was qualitatively distinct from the right of free expression, a distinct standard might govern when that right of access (*versus* the right of free expression) deserved protection.[53] In a separate concurring opinion, Justice Brennan explored what that different standard might be.

When Does the Right of Press Access Prevail?: Justice Brennan's Proposal

Justice Brennan argued that the right of access under the First Amendment, while violated by the outright closure of a full trial, has certain limitations. In his view, those limitations are first defined by whether there has been a historical practice of public access to the particular type of proceeding at issue.[54] The limitations are further defined by whether, past practice aside, public access to a given type of proceeding has promoted the functioning of the criminal justice system.[55] Justice Brennan implied that unless one of these tests is met, there is no right of access to criminal proceedings.[56]

The Court Delineates the Scope of the First Amendment Right of Access

Between 1982 and 1984, the United States Supreme Court applied the new First Amendment right of access to criminal proceedings in two cases.[57] In each case, the prosecution sought and obtained closure over the objection of both the defense and the media. In these two cases, the Court defined a standard that heavily favors access by the press. It is essentially identical to the standard that governs the protection of the right to disseminate ideas under the First Amendment.

A "Compelling Interest-Narrowly Tailored Means" Standard

In *Globe Newspaper Co. v. Superior Court*,[58] the Supreme Court held that a Massachusetts statute that required the closure of trials during the testimony of crime victims under the age of eighteen impermissibly infringed on the right of the press and the public to have access to the trial proceeding under the First Amendment.[59] The Court held that any attempt by the state to

49. *Id.* at 582-600.

50. *Id.* at 603 (Blackmun, J. concurring in the judgment). In a jab at the plurality in *Gannett*, Justice Blackmun noted, "the very existence of the present case illustrates the utter fallacy of thinking, in this context, that 'the public interest is fully protected by the participants in the litigation." *Id.* at 603 n.3. One of the members of the *Gannett* plurality, Justice Stevens, observed that "it is likely that the closure order was motivated by the judge's desire to protect the individual defendant from the burden of a fourth criminal trial." *Id.* at 584.

51. *Id.* at 582-83.

52. *Id.* at 603.

53. *Id.* at 582-83.

54. *Id.* at 587.

55. *Id.*

56. *Id.* at 589, 597-98. "[R]esolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances." *Id.* at 597-98.

57. *See generally* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Press Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984).

58. 457 U.S. 596 (1982).

close a trial proceeding to avoid the disclosure of "sensitive information" required the state to show that closure advances a "compelling governmental interest" and "is narrowly tailored to serve that interest."[60]

In support of the statute, the state articulated two governmental interests: (1) the protection of minor victims of sex crimes from the further trauma and embarrassment of testimony and (2) encouraging these victims to come forward and to offer truthful testimony. The Court found that the first of these interests was a compelling one; however, the statute was not narrowly tailored to advance that interest.[61] Other narrowly tailored means of protecting the psychological and physical well-being of a minor witness existed. Specifically, trial judges in Massachusetts can determine, on a case-by-case basis, whether closure is necessary to protect a witness' welfare and to encourage a witness to come forward and to testify.[62]

In a dissenting opinion, Chief Justice Burger and Justice Rehnquist argued that the majority had taken the First Amendment's right of access too far. In their view, the majority's "compelling state interest-narrowly tailored means" test placed too much weight on the importance of public access and too little emphasis on the state's interest in administering criminal justice as it sees fit.[63] The closure need only further the state's interest, it need not be "narrowly tailored" to do so.[64] Moreover, the state's interest need only outweigh the press and the public's right of access; it need not be "compelling."[65] The dissenters noted that "[i]t is hard to find a limiting principle in the Court's analysis. The same reasoning might require a hearing before a trial judge could hold a bench conference or any in camera proceedings."[66] The dissenters urged the Court to apply the limiting principle that Justice Brennan proposed in *Richmond Newspapers*.[67]

"Compelling Interest-Narrowly Tailored Means" versus the Brennan-Stevens "Limiting Principle"

In *Press-Enterprise Co. v. Superior Court of California*[68] (*Press-Enterprise I*), the Court unanimously held that a blanket closure of the voir dire proceedings, over the objection of the defense, impermissibly infringed on the public's First Amendment right of access.[69] The Court applied the "compelling state interest–narrowly tailored means" test of *Globe Newspaper* to the closure. The Court agreed that the right of privacy of the jurors was a compelling interest; however, closure of the entire voir dire proceeding was not narrowly tailored to serve that interest.[70] If an individual juror expresses a desire to be questioned in a closed hearing to protect his or her privacy, the judge can evaluate that request in camera to determine if closure is necessary.[71]

In a concurring opinion, Justice Stevens reached the same result as the majority but applied a different rationale. Animated by his insight (first expressed in *Richmond Newspapers*)

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59. *Id.* at 610.

60. *Id.* at 606-07.

61. *Id.* at 607. The Court treated the state's interest in encouraging testimony by underage victims of sex offenses with skepticism.

> [T]hat same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward. Surely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify.

Id. at 610.

62. *Id.* at 608-09.

63. *Id.* at 615.

64. *Id.* at 616-17.

65. *Id.*

66. *Id.* at 614 n.4.

67. *Id.* at 613-14 (citing and quoting Brennan, J. concurring in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584-600 (1980)). Given Justice Brennan's emphasis on inquiring whether there is a historical tradition of press and the public access to the particular proceeding at issue, the dissenters observed: "It would misrepresent the historical record to state that there is an 'unbroken, uncontradicted history' of open proceedings in cases involving the sexual abuse of minors." *Id.* at 614.

68. 464 U.S. 501 (1984).

69. *Id.* at 511.

70. *Id.* at 510-11.

71. *Id.* at 512-13.

that press access is a right that is distinct from the right of free expression and deserving of less protection, Justice Stevens applied Justice Brennan's "limiting principle" of First Amendment access to trial proceedings.[72] Justice Stevens stated that "[a] claim to access cannot succeed unless access makes a positive contribution to [the] process of self-governance."[73] Public knowledge of the voir dire process is necessary for the public understanding and governance of the trial process generally. However, public knowledge of private matters of certain potential jurors is *not* necessary for public understanding of, and ultimate control over, the process of selecting jurors in criminal trials.[74]

A First Amendment Right of Access to Pretrial Proceedings: Press-Enterprise II

In 1986, the United States Supreme Court rendered its last opinion to date on the subject of press and the public access to criminal proceedings.[75] In *Press-Enterprise II*,[76] the Court held that the First Amendment right of access applied to pretrial proceedings.[77] In doing so, the Court tacitly reversed on its holding in *Gannett Co. v. DePasquale*[78] that a criminal defendant, in order to obtain closure of a pretrial proceeding in which matters that are potentially prejudicial to a later jury pool will be aired, need only show that an open pretrial hearing is "reasonably likely" to jeopardize his right to a fair trial.[79]

In *Press-Enterprise II*, a defendant in a highly publicized multiple murder case in California moved for his pretrial hearing to be closed. The purpose of a preliminary hearing in California is to determine whether there is probable cause for a case to proceed to trial.[80] "The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence."[81] Thus, the California preliminary hearing serves the functions of both a probable cause hearing and a pretrial suppression hearing. Apart from the power of the presiding magistrate to suppress evidence, the California procedure is much like the military's Article 32 hearing.[82]

The magistrate who presided over the defendant's hearing granted the defense motion for closure on the basis that "the case had attracted national publicity."[83] The magistrate further found that, because only the government's case would be presented in the probable cause hearing, "only one side may get reported in the media" should the hearing be open to the press and the public.[84]

The Majority: Gannett Reversed?

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72. *Id.* at 517-19.

73. *Id.* at 518.

74. *Id.* at 518-19.

75. In *Waller v. Georgia*, the defendant, rather than a member of the press, raised as an appellate issue the closure, over the defendant's objection, of a pretrial suppression hearing on the prosecution's motion. 467 U.S. 39 (1984). The Court did not have to face the question of whether the First Amendment right of access, first articulated in *Richmond Newspapers*, applied to pretrial suppression hearings. Instead, the Court simply held that the defendant's Sixth Amendment right to a public trial applied to suppression hearings as much as to the trial on the merits. *Id.* at 48. While the right is not absolute, it can be abridged only on a showing of a compelling or overriding state interest. Additionally, closure of the proceeding must be narrowly tailored to advance that interest, taking into account alternatives short of closure. *Id.* at 47. The state pointed to a peculiar state statute that rendered inadmissible in other cases any information obtained under a wiretap warrant and then released to the public. The Court held that closure of the entire suppression hearing was not a narrowly tailored means of advancing the state's interest in preserving its ability to bring other prosecutions. *Id.* at 48-49. While the Court applied the Sixth Amendment rather than the First Amendment, the "compelling state interest-narrowly tailored means" test the Court used was identical to the strict standard first applied in *Globe Newspaper Co. See* Globe Newspaper Co.v. Superior Court, 457 U.S. 596 (1982).

76. Press-Enter. Co., v. Superior Court of Cal., 478 U.S. 1 (1986).

77. *Id.* at 13.

78. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

79. *Id.* at 399.

80. *Press-Enter. Co.*, 478 U.S. at 12.

81. *Id.*

82. *See supra* note 7.

83. *Press-Enter. Co.*, 478 U.S. at 4.

84. *Id.* On review, the California Superior Court agreed and held that there was "a reasonable likelihood that [an open hearing] might prejudice defendant's right to a fair and impartial trial." *Id.* at 1. The California State Supreme Court affirmed, citing "the defendant's right to a fair and impartial trial by a jury uninfluenced by news accounts." *Id.* at 5.

The Court purportedly adopted the "limiting principle" that was first proposed by Justice Brennan in *Richmond Newspapers* and that was reiterated by Justice Stevens in *Press-Enterprise I.* Specifically, the Court considered whether preliminary hearings historically have been open to the press and the public and whether "public access plays a significant positive role in the functioning of the particular process in question."[85] The Court found that there was a tradition of public access to preliminary hearings.[86] The Court reasoned that because preliminary hearings in California are closely similar to trials on the merits, public access is as important to the functioning of preliminary hearings as it is to the functioning of trials.[87] Therefore, presiding magistrates can close preliminary hearings only if two circumstances exist: (1) it is substantially probable that a defendant's right to a fair trial will be prejudiced and (2) if other alternatives "*cannot* adequately protect the defendant's fair trial rights."[88] The magistrate and the reviewing California Superior Court erred by failing to apply this strict standard to the issue of closure.[89]

In applying Justice Brennan's "limiting principle," the Court did not abandon or retreat from the "compelling interest–narrowly tailored means" test that was set forth in *Globe Newspaper* and *Press-Enterprise I*. Rather, the Court used that test and the Brennan limiting principle. "[T]he proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[90] Though the form of the Court's analysis changed somewhat, the result of that analysis remained the same. The Court still treated the right of press access as deserving the highest protection. Therefore, a proceeding can only be closed if the trial court cannot protect the defendant's right to a fair trial in any other way.

The Dissent: Has Solicitude for Press and the Public Access Run Amok?

In a dissenting opinion, Justices Rehnquist and Stevens argued that the majority had misapplied Justice Brennan's "limiting principle."[91] The dissent argued that, instead of inquiring whether there is a historical tradition of preliminary hearings being open to the press and the public, the Court should have inquired whether such pretrial inquiries were open to the public at the time of the adoption of the Bill of Rights.[92] As the plurality in *Gannett* had found, there was no tradition of openness at the time that the Bill of Rights was adopted.[93]

The dissenters then addressed the majority's position that public access to preliminary hearings is as important to the functioning of the judicial proceeding as public access to trials on the merits. The dissent stated that if the majority's view was correct there must also be a First Amendment right of access to federal grand jury proceedings.[94]

Reverting to the plurality opinion in *Gannett*,[95] the dissenters argued that a trial judge has an overriding responsibility to minimize prejudicial pretrial publicity.[96] In the dissenters' view, the California courts had been correct in assuming that the preliminary hearing could be closed on a finding that there was a "reasonable likelihood" that an open hearing would substantially prejudice the defendant's right to a fair trial.[97] In the realm of pretrial proceedings, the First Amendment rights of the press and the public do not deserve the level of protection that is afforded to them by the "compelling government interest–narrowly tailored means" test.[98]

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85. *Id.* at 8.

86. *Id.* at 10-11.

87. *Id.* at 11-13.

88. *Id.* at 14 (emphasis added).

89. *Id.* at 14-15.

90. *Id.* at 13-14 (citing *Press-Enterprise Co. v.Superior Court of California*, 464. U.S. 502, 510 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982)).

91. *Id.* at 21.

92. *Id.*

93. *Id*. at 21-25. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 374-76 (1979).

94. *Press-Enter. Co*., 478 U.S. at 25-27.

95. *Gannett*, 443 U.S. at 378.

96. *Id.* at 16 n.1.

97. *Id.* at 16.

The Court of Appeals for the Armed Forces and Public Access to Courts-Martial

The Court of Military Appeals (COMA) addressed the issue of public access to courts-martial for the first time in 1956, in *United States v. Brown*.[99] In *Brown*, the convening authority had ordered a closed trial to protect a female civilian from embarrassment as she related the details of obscene phone calls made to her by the accused. Over an objection by the defense, the law officer upheld the convening authority's closure.[100]

The COMA held that, although the Sixth Amendment did not apply to courts-martial, "military due process" includes a right to an open trial by court-martial.[101] The court listed four reasons why courts-martial should be open to the public: (1) to ensure that the advocates and judges observe the procedural rights of the accused and that the trial counsel diligently vindicates the disciplinary interests of the military; (2) to leave open the possibility that witnesses with knowledge of the case, who are unknown to the parties, will come forward with relevant information; (3) to promote public confidence in the military criminal justice system; and (4) to protect the accused's presumption of innocence.[102] The court reasoned that if a trial were closed, the trier of fact might infer that government witnesses in the particular case needed some sort of extraordinary protection.[103] In the court's view, protecting an adult female witness from possible embarrassment was not a governmental interest that was sufficient to overcome the due process interest of the accused in a public trial. Accordingly, the court reversed the accused's conviction.[104]

An Independent Right to a Public Trial by Court-Martial

In 1977, the COMA again addressed the issue of partial closure of a court-martial in *United States v. Grunden.*[105] The court held that the "right to a public trial is indeed required in a court-martial."[106]

The court found that the military judge had committed prejudicial error by closing the court-martial at the government's request.[107] The military judge had closed the portion of the accused's trial that pertained to espionage charges simply on the basis that classified information would or might be discussed. The military judge, however, failed to ascertain which witnesses would discuss classified information and to what extent each witness would do so.[108] The military judge also failed to assess independently whether public testimony about that classified information would actually pose a danger to national security.[109] The military judge could exclude the public and the press only from those portions of each witness' testimony that concerned matters that would endanger national security if made public.[110] By imposing a blanket closure rather than a surgical one, the military judge committed error "of con-

98. *Press-Enter. Co*, 478 U.S. at 28-29. The "reasonable likelihood of prejudice" standard used by the California Superior Court in affirming the magistrate's closure order was substantially the same as the "reasonable probability of prejudice" standard approved by the Court in *Gannett. See Gannett*, 443 U.S. at 376, 400 (1979). For this reason, the dissent in *Press-Enterprise II* closed with the observation that the majority had overruled *Gannett* "without comment or explanation or any attempt at reconciliation." *Press-Enter. Co.*, 478 U.S. at 29.

99. 22 C.M.R. 41 (C.M.A. 1956).

100. *Id.* at 44.

101. *Id.* at 46.

102. *Id.* at 45, 47, 49. The first three reasons for keeping courts-martial open were identical to those given by the United States Supreme Court in the case of *In re Oliver. See* 333 U.S. 257 (1948). In *Oliver*, the United States Supreme Court held that a witness who was called before a "one-man grand jury" in the State of Michigan (a grand jury consisting of one judge) could not be summarily imprisoned based on the judge's finding in a closed hearing that the witness was lying. *Id.* at 272-74. The Court held that the due process clause of the Fourteenth Amendment prohibited any criminal proceeding from taking place out of public view. *Id*. at 273. Because *Oliver* involved a state criminal proceeding rather than a federal one, the Court did not address whether the Sixth Amendment requirement of a public trial applied to the Michigan criminal contempt proceeding. The Court did not begin to incorporate the criminal procedure provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment until it decided *Mapp v. Ohio. See* 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule applied to state proceedings *via* Fourteenth Amendment due process clause).

103. *Brown*, 22 C.M.R. at 49.

104. *Id.*

105. 2 M.J. 116 (C.M.A. 1977).

106. *Id.* at 120 n.3.

107. *Id.* at 124.

108. *Id.* at 123.

109. *Id.* at 122-23.

110. *Id.* at 122.

stitutional magnitude" and reversal was required.[111] Thus, the COMA established a strict presumption against closure of a trial on the merits, even when the parties place classified subject matter and materials in evidence.

Wholesale Adoption of the Supreme Court's Jurisprudence on Public Access

In 1985, the COMA declared for the first time that "the Sixth Amendment right to a public trial is applicable to courts-martial."[112] In *United States v. Hershey*, the trial counsel had requested that the court be closed to facilitate the testimony and to minimize the embarrassment of a victim-witness, the accused's thirteen-year-old daughter. Over a defense objection, the military judge closed the court without hearing evidence on the necessity of closure or making any findings.[113] The issue in *Hershey* was, therefore, substantially the same as the issue addressed by the United States Supreme Court in *Globe Newspaper.*[114]

Applying the full line of Supreme Court cases on the issue of closure, the COMA acknowledged that "the press and general public have a constitutional right under the First Amendment to access to criminal trials," including courts-martial.[115] Thus, any party who seeks to close a court-martial must make a showing that satisfies the "compelling government interest-narrowly tailored means" test.[116] In *Hershey*, the government did not produce specific evidence about the ability of the accused's daughter to testify in open court. In addition, the court neither considered alternatives to closure nor made any findings to support closure. Therefore, the COMA held that the military judge's decision to close the trial was erroneous.[117]

The CAAF has applied the Supreme Court's doctrine on public access to military courts-martial in only two cases since its adoption of that doctrine in *Hershey.* In *United States v. Travers*,[118] the court held that an accused's desire to minimize publicity about his service as an informant did not justify closure of the court during the sentencing phase of the trial.[119] Assuming that the accused's interest in concealing his informant activities was compelling, the court held that closure of the trial was unnecessary to vindicate that interest.[120] Details of an accused's informant activities can be brought to the attention of the sentencing authority by way of documents that are kept from public view. Thus, the military judge did not abuse his discretion in denying the request for closure.[121]

The second case after *Hershey* in which the CAAF applied the public access doctrine to military proceedings is *ABC, Inc. v. Powell.*[122] The court in *ABC* considered an extraordinary writ to determine whether the Article 32 hearing in the case of Sergeant Major Gene C. McKinney should be closed over the sergeant major's objection.[123] The court applied the Supreme Court's doctrine on press and the public access to *pretrial* proceedings for the first time.[124]

Because Sergeant Major McKinney joined the press in objecting to the closure of the Article 32 investigation, the court held that he was invoking his Sixth Amendment right to a public trial.[125] That right could be abridged only to serve a compelling interest and only by narrowly tailored means.[126] The court found that the government simply failed to substantiate the rea-

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111. *Id.* at 123.

112. United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985).

113. *Id.* at 435.

114. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 806(d) discussion (1995).

115. *Hershey*, 20 M.J. at 436.

116. *Id.* Following the lead of the COMA, the *Manual for Courts-Martial* (in supplementary discussion but not in a binding rule) urges a strict standard on military judges. MCM, *supra* note 114, R.C.M. 806(d) discussion. "Absent an overriding interest articulated in the findings, a court-martial must be open to the public." *Id.*

117. United States v. Hershey, 20 M.J. 436 (C.M.A. 1985). However, because the closure applied to the testimony of only one witness and resulted only in the exclusion of the appellant's escort and the bailiff, the court found no prejudice to the accused. *Id.* at 437-38.

118. 25 M.J. 61 (C.M.A. 1987).

119. *Id.* at 63.

120. *Id.*

121. *Id.* In *United States v. Short*, the COMA held that a military judge's expulsion from the courtroom of spectators (the accused's young children), whom the judge feared would cause noise and distraction, was a reasonable measure to preserve order in the courtroom and did not implicate any constitutional issues. 41 M.J. 42, 43 (C.M.A. 1994).

122. 47 M.J. 363 (1997).

123. *Id.*

sons it offered for closure.[127] Specifically, the government had sought closure in an effort to protect the privacy of the alleged victims and to prevent contamination of any pool of panel members at a later trial by evidence that was admissible at the Article 32 but not at trial.[128] The court found that the government failed to point to any specific items of evidence which would be aired at the Article 32 but would not be admissible at trial.[129] Also, the government failed to specify which witnesses would be subject to invasions of privacy and failed to make a record of the potential for any such invasion of privacy.[130] The court implied that even if Sergeant Major McKinney had not opposed the closure of the Article 32, the court would have afforded equal standing to the press entities as extraordinary writ petitioners and would have opened the Article 32 on First, rather than Sixth, Amendment grounds.[131]

Why Military Standards Governing Press Access Are Identical to Civilian Standards

The COMA invoked "military due process" in *Brown* to support keeping courts-martial open to the press and the public.[132] However, courts have more often invoked the rubric of "military due process" to justify various ways in which the military justice system *departs* from civilian practice. Because the military justice system is an integral part of a war-fighting institution, Congress is deemed to have broader plenary power to enact or to authorize practices that, if enacted within a civilian criminal system, might not pass constitutional muster.[133]

Initially, it might be assumed that "military due process" justifies less open criminal proceedings in the military than in civilian criminal systems. For example, press and public access to courts-martial might be restricted by way of local post regulations that restrict access to a post for legitimate security reasons.[134] Similarly, commanders may have to convene courts-martial in theaters of operations or armed conflict where the press and the public should be excluded for operational reasons.[135]

There is, however, ample reason for the CAAF to hold, as it did it in *Hershey,* that military standards that govern public access to military justice proceedings should replicate the standards that were enunciated by the United States Supreme Court for civilian courts. If Congress and the President, with the blessing of the United States Supreme Court, are permitted to fashion a military justice system with features that would not be tolerated in any civilian criminal forum, it is all the more impor-

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124. In *MacDonald v. Hodson,* 42 C.M.R. 184 (C.M.A. 1970), the COMA addressed the issue of open *versus* closed pretrial proceedings for the first time. 42 C.M.R. 184 (C.M.A. 1970). However, *MacDonald* preceded the entire line of United States Supreme Court cases from *Gannett Co. v. DePasquale* to *Press-Enter. II.* In *MacDonald,* the court considered a petition for extraordinary relief by which the accused sought to compel an Article 32 investigating officer to hold an open Article 32 hearing. *Id.* The court noted that even though the accused desired an open proceeding, the investigating officer was acting in the accused's best interests by keeping potentially prejudicial information from the public. The court held that the Article 32 investigation is not a trial within the meaning of the Sixth Amendment; therefore, the public trial requirement did not apply to the Article 32. *Id.* at 185. Until recently, service courts were apt to follow the *MacDonald* precedent rather than apply United States Supreme Court doctrine to the issue of open *versus* closed pretrial proceedings. *ABC* now makes clear that the United States Supreme Court doctrine governs public access to Article 32 proceedings, and by implication all pretrial proceedings, including Article 39(a) sessions. 47 M.J. at 363-65.

125. *ABC,* 47 M.J. at 365.

126. *ABC,* 47 M.J. at 365. Although the court did not cite *Waller v. Georgia,* it is the United States Supreme Court case that most directly supports the proposition that when a criminal accused opposes closure of a *pretrial* proceeding, the accused is invoking his Sixth Amendment right to a public trial, a right which can only be abridged to serve a compelling government interest and only by narrowly tailored means. *See* Waller v. Georgia, 467 U.S. 39 (1984).

127. *ABC,* 47 M.J. at 366.

128. *Id.* at 364.

129. *Id.*

130. *Id.*

131. *Id.* at 365.

132. *See* United States v. Brown, 22 C.M.R. 41 (C.M.A. 1956).

133. *See, e.g.,* Weiss v. United States, 510 U.S. 163, 176-78 (1994) (finding that the fact that military judges lack a fixed term of office comports with military due process); Middendorf v. Henry, 425 U.S. 57 (1981) (holding that deprivation of the right to counsel before summary courts-martial comports with military due process).

134. One service court opinion raises the possibility that restraint on access to the installation might be used as a proxy for restricting access to courts-martial. "Members of the public not otherwise authorized to be present upon a military installation are not so authorized by virtue of the trial of a court-martial on the installation." United States v. Czarnecki, 10 M.J. 570, 572 n.3 (A.F.C.M.R. 1980).

135. "Military exigencies may occasionally make attendance at courts-martial difficult or impracticable, for example, when a court-martial is conducted on a ship at sea or in a unit in a combat zone. However, such exigencies should not be manipulated to prevent attendance at a court-martial." MCM, *supra* note 114, R.C.M. 806(a) discussion.

tant for the civilian press and the public to be able to monitor how the military justice system functions. For example, because the assignment and service of military judges are arguably subject to the will of superior officers,[136] it is all the more vital for the press and the public to monitor how those judges function given their lack of ultimate independence from a superior, non-judicial authority.[137]

The State of the Law on Open Pretrial Military Justice Proceedings: A Scenario

The current state of the law in this area is best understood by looking at a hypothetical fact situation. Suppose a military accused, who is stationed in Germany, is charged with sexual abuse of his six-year-old stepson. The alleged abuse took place two years ago. The stepson and his mother have been living in Denver, Colorado for eighteen months. The allegation came to light when a nun in a parochial school counseled the boy regarding sexual activity with his minor cousins. The nun has an associate's degree in psychology. Criminal Investigation Division (CID) agents at Fort Carson videotaped their interview of the boy, in which they used anatomically correct dolls and more leading questions than open-ended ones. The boy refused to return to Germany for the trial. He also refused to answer questions at a deposition in Colorado. The nun, however, submitted to an extensive videotaped deposition regarding her sessions with the boy. She is willing to testify in Germany.

The defense has moved to exclude the CID videotape and to bar the testimony of the nun as inadmissible hearsay[138] and as violating the accused's confrontation clause rights.[139] Before the beginning of an Article 39(a)[140] session to rule on these motions, the defense counsel notices a *Stars and Stripes* newspaper reporter in the courtroom. The *Stars and Stripes* is the only daily English language newspaper available to United States service members in Europe and is widely read by them on a daily basis. The reporter has been present at previous pretrial sessions in other recent cases and has filed detailed reports of those hearings.[141]

The defense counsel, in an in camera session pursuant to Rule for Courts-Martial 802,[142] asks the judge to exclude spectators.[143] The defense counsel argues that the risk of prejudicial pretrial publicity is great. The defense argues that if the CID videotape and the testimony of the nun are excluded, the contents of each will nevertheless be prominently reported in the only daily newspaper available to the pool of potential panel members. Additionally, even if the military judge denies the defense motion, the fact that the defense sought to keep this information from the triers of fact will also be prominently reported.

In light of the United States Supreme Court's decision in *Press-Enterprise II*,[144] the military judge is likely to find that the accused's right to minimize prejudicial pretrial publicity is a compelling interest. However, the judge is also likely to find that excluding the press and the public from the Article 39(a) session is not a narrowly-tailored means of serving that interest.[145] Rather, in line with the majority's opinion in *Press-Enterprise II*, the military judge is likely to rule that voir dire of the panel members is a sufficient alternative means of avoiding prejudice. During voir dire, the court and counsel can assess whether prospective members of the panel read the *Stars and Stripes* articles and whether, even if they have read the articles, they can still reach a verdict impartially based on the facts that are presented in court.

136. *See generally* Fredric I. Lederer and Barbara S. Hundley, *Needed: An Independent Military Judiciary–A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL OF RTS. J. 629 (1994).

137. It could be argued that other unique features of the military justice system permit *greater* openness to the press and the public than in the civilian system. The whole purpose for closing a pretrial proceeding is to prevent potential jurors from receiving certain information through the press or other media prior to trial. When the trier of fact is a panel of professional commissioned and non-commissioned officers, the panel is arguably less susceptible to inflammatory or prejudicial information that is disseminated through the media than would a jury selected at random from the general citizenry.

138. MCM, *supra* note 114, MIL. R. EVID. 802 (providing that hearsay is generally inadmissible).

139. U.S. CONST. amend. VI (guaranteeing, *inter alia*, the right to confront prosecution witnesses).

140. Under UCMJ Article 39(a) a military judge may hold hearings outside the presence of panel members to adjudicate matters that do not require their presence. UCMJ art. 39(a) (West 1995).

141. A case that had been recently litigated before the same military judge in the same courtroom had involved an accused who had been living in Stuttgart in desertion for eight years. During his desertion, the accused had allegedly preyed on local national women by posing as a U.S. National Security Agency special agent in need of short-term loans to redress purported tax problems. The loans were never repaid. The reporter had filed detailed reports of the Article 39(a) sessions in the desertion case, in which a speedy trial motion was litigated.

142. *See* MCM, *supra* note 114, R.C.M. 806(b), authorizes the military judge to hold conferences with the parties in chambers "to consider such matters as will promote a fair and expeditious trial." *Id.* at R.C.M. 802(a).

143. MCM, *supra* note 114, R.C.M. 806(b) (authorizing the military judge to close a court-martial session on the motion of the accused, provided the accused shows "good cause").

144. Press-Enter. v. Superior Court of California, 478 U.S. 1 (1986).

Under this scenario, the defense will be left with a panel that is quite possibly tainted, yet impartial in the eyes of the law. Under the *Press-Enterprise II* standard, military judges will rarely, if ever, abridge the First Amendment interests of the *Stars and Stripes* as an agent of the public. At the same time, military judges who follow this standard in good faith will almost always sacrifice the right of the accused to a fair trial.

A More Balanced Approach Is Needed (and Is Already Being Applied)

In *Press-Enterprise II*, Chief Justice Rehnquist and Justice Stevens opined that the Court's former deference toward the authority of a trial judge to ensure that the accused is afforded a fair trial has been turned on its head. In their view, the majority had simply decided to place an extremely high value on the press' and the public's recently discovered First Amendment right of access and a concomitantly low value on the right of an accused to minimize the effects (which are often difficult to trace and quantify) of prejudicial pretrial publicity. Referencing the distinction between press access and free expression that was first noted by Justice Stevens in *Richmond Newspapers, Inc. v. Virginia*,[146] the dissenters emphasized that "the freedom to obtain information that the government has a legitimate interest in not disclosing is far narrower than the freedom to disseminate information, which is 'virtually absolute' in most contexts."[147] In the view of Justice Stevens and the Chief Justice, the majority was wrong to protect the freedom of *access* to information with the same "compelling government interest–narrowly tailored means" presumption that is used to protect the freedom to *disseminate* information.[148] The two First Amendment interests were not deserving of the same level of protection.

The two justices scolded the majority (Justice Brennan included) for ignoring, or at best misapplying, the "limiting principle" that Justice Brennan himself had proposed in *Globe Newspaper Co. v. Superior Court*. They opined that the analysis should focus on whether public access to a particular pretrial proceeding is rooted in historical practice and, apart from tradition, whether public access to that particular proceeding actually helps the criminal justice system work. If so, the question should turn to whether public access still poses a substantial danger to the accused's right to a fair trial. Even if the answer to both questions is "yes," the trial judge would not abuse his discretion by excluding the press and the public from the proceeding.

At other levels, the federal judiciary is beginning to recognize that there is a need for this more reasonable balancing of the interests of the accused and the public. Recently, no federal judge has had to more squarely face the issue of prejudicial pretrial publicity than U.S. District Court Judge Richard P. Matsch, who presided over the trials of those who were convicted of plotting to bomb the Murrah Federal Building in Oklahoma City in April 1995. In a January 1996 opinion, Judge Matsch gave guidance to media, defense, and government counsel regarding the standards that he would apply to public and media access in managing these complex and emotionally charged cases.[149] Judge Matsch explicitly announced that he would follow the approach of the Rehnquist-Stevens dissent in *Press-Enterprise II*, rather than apply the "compelling interest-narrowly tailored means" approach of *Globe Newspapers*, *Press-Enterprise I*, and the *Press-Enterprise II* majority.[150]

First, Judge Matsch adopted Justice Brennan's "limiting principle." Judge Matsch reasoned that there is no First Amendment right of access unless: (1) the matter to which the press and the public seek access "involve[s] activity within the tradition of free public access to information concerning criminal prosecutions" and (2) "public access play[s] a significant positive role in the activity and in the functioning of the process."[151]

Second, Judge Matsch discarded the "compelling interest-narrowly tailored means" test in favor of a balancing of interests starting with a level scale rather than one that is weighted in favor of the First Amendment right of access. If protection of a "recognized interest" outweighs the First Amendment right of access, and if closure is "essential" to protect that interest in the light of any "reasonable alternatives," the court will be closed.[152]

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145. In non-binding discussion, the *Manual for Courts-Martial* addresses the issue of access to pretrial proceedings as follows: "When [pretrial] publicity may be a problem a [pretrial Article 39(a)] session should be closed only as a last resort." MCM *supra* note 114, R.C. M. 806(b) discussion. The discussion recommends using the alternatives of thorough voir dire; a continuance "to allow the harmful effects of publicity to dissipate;" selecting panel members recently arrived or from outside the area; sequestration; or moving the place of trial. *Id*.

146. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

147. *Press-Enter.*, 478 U.S. at 20.

148. *See id.* at 28-29.

149. United States v. McVeigh, 918 F. Supp. 1452 (D. Colo. 1996).

150. Instead of openly announcing defiance of the United States Supreme Court, Judge Matsch used the following diplomatic language: "The reach of the ruling in *Press-Enter. II* can be measured by careful consideration of the dissenting opinion of Justice Stevens, joined by Justice Rehnquist." *Id*. at 1463.

151. *Id.* at 1464.

Based on this standard, Judge Matsch denied media access to statements rendered by defendant Terry Nichols to the Federal Bureau of Investigation a few days after the bombing (as well as various other items that remained under seal), until after the trial of co-defendant Timothy McVeigh was completed. The Nichols statements were the subject of litigation in a pretrial suppression hearing and were also at issue in the defendants' motion to sever their trials. In denying media access, Judge Matsch noted that public and media access to these statements was not grounded in historical practice and would not have advanced the functioning of either the suppression hearing or the severance litigation.[153] In any event, defendant McVeigh's right to a fair trial overrode the public's right of access to the statements.[154]

Thus, when the defense counsel in the previous hypothetical asks the military judge to close the Article 39(a) session, under the Rehnquist-Stevens-Matsch approach, the military judge might well find as follows. First, there is no substantial historical evidence that the press and the public have traditionally been able to have access "on demand" to a pretrial proceeding in the nature of a suppression hearing. However, public access might advance the operation of the particular pretrial proceeding at issue. The proceeding ensures that hearsay statements that are made by a victim of child sexual abuse, who is reluctant or unwilling to testify, will be admitted against the accused so long as they are sufficiently reliable. The public should be able to assure itself that the court is discharging its obligation to bring such reliable evidence before the trier of fact.

Second, even though public access advances the proper functioning of the confrontation clause and hearsay litigation, permitting the child's out-of-court statements to the nun and to the CID agents to be aired in the one daily newspaper available to all of the potential panel members poses a substantial danger to the right of the accused to a fair trial. If the judge excludes the statements, panel members might still be aware of their contents, at least as distilled by the *Stars and Stripes* reporter. If the judge admits the statements, the potential panel members may know that the defense tried to keep them out of evidence.

Alternatives that are short of closure, would not suffice to protect the accused's right to a fair trial. Unlike a simple suppression of a confession, more is at issue in this confrontation clause/residual hearsay type of hearing than how law enforcement obtained evidence. As a matter of constitutional law, the *intrinsic* characteristics of the hearsay statements (what they say as well as how they were obtained) are the keys to their reliability or lack thereof.[155] Litigation entails arguing about the substance of the evidence sought to be excluded, not just how law enforcement obtained the evidence. Therefore, the military judge might conclude that the courtroom should be closed for the confrontation clause/hearsay hearing.

Conclusion

With increasing frequency, military judges and Article 32 investigating officers must confront the issue of whether and to what extent pretrial military justice proceedings should be open to the press and the public. Even as the number of courts-martial declines, some cases receive heightened, if not unprecedented, attention in the broadcast and print media. Even in areas where court-martial procedures parallel civilian criminal procedure, rules which infringe on the public's right of access for what is thought to be a higher good are apt to spark litigation asserting the right of public access.[156]

The First Amendment right of access to criminal proceedings that was established by the United States Supreme Court in 1980 is not on par with the distinct First Amendment rights of free expression and free dissemination of information. The right of access is not as important as other interests at stake, particularly the right of the accused to a fair trial. Yet, the United States Supreme Court has treated the right of access as equivalent in value to the right to disseminate information freely. The Court permits restrictions on access only in the rarest and most narrowly defined of circumstances. The standing precedent of the CAAF indicates that military courts must follow the United States Supreme Court's lead. However, Judge Matsch has demonstrated that even a federal trial judge need not inflexibly apply the strict approach taken by the United States Supreme Court.[157]

In opposition to this prevailing approach to the right of access, certain justices of the United States Supreme Court, as well as federal trial judges who must directly contend with demands for public access and the consequences of pretrial

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152. *Id.*

153. *See* United States v. McVeigh, 1996 WL 578516, at *37-38 (D. Colo. Trans.) (Judge Matsch's ruling on unsealing of severance motion materials).

154. *Id.*

155. *See* Idaho v. Wright, 497 U.S. 905 (1990).

156. For example, a fertile source of public access issues may lie in the recently amended version of the rape-shield rule, Military Rule of Evidence 412. *See* MCM, *supra* note 114, MIL. R. EVID. 412. Amendments to the Military Rules of Evidence, including Military Rule of Evidence 412, are adopted automatically from amendments of parallel provisions of the civilian Federal Rules of Evidence "unless action to the contrary is taken by the President." *Id.* MIL. R. EVID. 1102. Military Rule of Evidence 412, as amended, now provides that when a litigant wishes to introduce evidence of specific incidents of the sexual behavior of the victim, the military judge "*must* conduct a hearing *in camera* and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise." *Id.* MIL. R. EVID. 412(c)(2) (emphasis added).

publicity, have recognized the need to even the scales between the right of public access and the right of the accused to a fair trial. The more balanced approach of Chief Justice Rehnquist, Justice Stevens, and Judge Matsch more accurately reflects the true nature of the First Amendment right of access. On a practical level, their more balanced approach re-empowers the trial judge to discharge his overriding duty, which is to ensure that the accused receives a fair trial that is untainted by prejudicial pretrial publicity.

157. The fact that the United States Supreme Court purported to adopt the Brennan-Stevens limiting principle in *Press Enter. II*, opens the door to application of that limiting principle without adhering to the compelling interest-narrowly tailored means test. *See* Press-Enter. v. Superior Court of California, 478 U.S. 1 (1986). That is precisely what Judge Matsch did in *McVeigh*. *See* United States v. McVeigh, 918 F. Supp. 1452 (D. Colo. 1996).