

Secret Justice:

Jury Proceedings And Records



Before the September 11 attacks, the biggest terrorism-related story in 2001 was the trial of those accused of working with Osama bin Laden to bomb two American Embassies in East Africa. The attacks killed 224 people, and two of the four defendants faced the death penalty. The case was so important — and so sensitive — that the Manhattan federal court decided to keep all information related to juror identities secret. According to *The New York Times*, “their names were not filed in court, or disclosed to the lawyers, prosecutors or even the judge.”

continued inside

Secret Justice: A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection.

Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of “the people” for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a “class” of persons similarly situated. The public, therefore, should be informed — well informed — about trials of public interest. The media, as the public’s representative, need to be aware of threats to openness in court proceedings, and must be prepared to fight to insure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We examine trends toward court secrecy, and what can be done to challenge it.

For the complete series of “Secret Justice” publications, visit www.rcfp.org/readingroom.



This guide was researched and written by Rory Eastburg, the Reporters Committee’s 2008–2009 McCormick Foundation Legal Fellow. Publication of this guide was funded by a grant from the McCormick Foundation.



AP Photo

Interviews with members of the secret jury in the prosecutions over the 1997 U.S. embassy bombings revealed biases and improper conduct that never came out in court..

Despite the secrecy, *The Times* managed to contact 11 of the 12 jurors and conduct post-verdict interviews with nine of them, writing about the interviews in a Jan. 5, 2003 story by Benjamin Weiser entitled “A Jury Torn and Fearful In 2001 Terrorism Trial.” The interviews uncovered the fact that two jurors, “concerned about the religious implications of voting for execution, violated the judge’s directive by consulting their local pastors during deliberations.” A third juror engaged in prohibited internet research, and a fourth “confused the court during jury selection about his willingness to impose a death sentence, and from the early stages of the trial had ruled it out.” According to the *Times*, “his adamant refusal to consider death helped lead to the deadlocks on execution.”

Nor was this case unique. In their 1999 article *Anonymous Juries: In Exigent Circumstances Only*, Abraham Abramovsky and Jonathan I. Edelstein examine mobster John Gotti’s first criminal trial. When Gotti was put on trial in 1992, the New York court empanelled a fully anonymous jury because it feared Gotti or his associates might threaten, intimidate, or otherwise tamper with the composition of the jury. Unbeknownst to the court, prosecutors, or the public, one of the jurors was George Pape, a man with ties to an Irish-American organized crime group. According to Abramovsky and Edelstein, Pape contacted Gotti’s attorneys, accepted a bribe, and arranged for Gotti’s acquittal. If the public had known Pape was on the jury, they argue, “his potential for corruption might have been unearthed

prior to trial.”

Similarly, in his 2000 article *The Public’s Right of Access to Juror Information Loses More Ground*, media lawyer Steven D. Zansberg examined several cases that highlight the role of openness in policing the jury system. For example, he wrote, “[a]ccess to juror information helped reveal that an African-American juror in Washington, D.C., refused to convict an African-American criminal defendant, regardless of the [e]vidence.” In another case, a law student on the jury erroneously instructed his fellow jurors on the law, and in a third, “news reports revealed that jurors in a civil case switched their votes late Friday afternoon from plaintiff to defendant solely to avoid having to resume deliberations after the weekend.”

Without the press and public to act as a watchdog on jury selection, the U.S. Court of Appeals in Boston (1st Cir.) wrote, some will wonder whether “jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups.” Moreover, “[i]t would be more difficult to inquire into such matters, and those suspicions would seem in any event more real to the public, if names and addresses were kept secret.” (*In re Globe Newspaper Co.*)

Secrecy in the jury process also risks the rights of the defendant because it may imply that the defendant is unusually dangerous, which in turn impairs the presumption of innocence. (*Ohio v. Hill*). Defense lawyers also often argue, as they did in a 1979 case

called *U.S. v. Barnes*, that withholding juror information of any type impairs their ability to thoroughly question potential jurors.

Despite these risks to the public's right to know and defendants' right to a fair trial, over the past few decades trial courts have increasingly limited public access to information about jurors. This is especially true where there is an unusual risk to juror safety — as with the Gotti trial. These courts said they feared that defendants or third parties would threaten or harass jurors if their identities were not concealed. A few courts have even cited media interest in a case, alone, as sufficient reason to withhold information about juries. The Supreme Court of Delaware, for example, upheld the use of an anonymous jury simply to curtail media coverage of the jurors, though it cited no particular fear for juror safety or jury tampering. (*Gannett Co. v. Delaware*).

The right of access to court proceedings and records

The public and press have a First Amendment right of access to judicial proceedings in criminal cases. In the seminal 1980 case *Richmond Newspapers, Inc. v. Virginia*, for example, the Supreme Court said that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”

The Supreme Court has not directly addressed whether the public and the press also have a constitutional right of access to *civil* cases, but many other federal and state courts have recognized a public right of access to civil proceedings and documents. The California Supreme Court, for example, found that “every lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials.” (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*).

When considering whether a constitutional presumption of access applies to particular proceedings or records, courts consider two factors — “whether the place and process have historically been open to the press and general public,” and “whether public access plays a significant positive role in the functioning of the particular process in question.” Where a constitutional presumption of access applies, the court may close proceedings only after making specific, on-the-record findings: (1) that closure is necessary to further a compelling governmental interest; (2) the closure order is narrowly tailored to serve that interest; and (3) that no less restrictive means are available to adequately protect that interest. (*Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”)).

Access to *voir dire* proceedings

Voir dire is the court proceeding where a jury is picked from a pool of prospective jurors (sometimes called the venire). During *voir dire*, prospective jurors are asked a series of questions — often touching on sensitive subjects — in order to determine whether they can serve as impartial jurors.

The Supreme Court recognized a First Amendment presumption of access to *voir dire* in *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise I*”), a 1984 case in which a California court closed all but three days of a six-week *voir dire* process in a high-profile murder prosecution. The closure was sought by both the government and the defense, out of concern for juror privacy and the defendant's Sixth Amendment right to a fair trial.

Despite the agreement of the parties, the Supreme Court found the closure unconstitutional, noting that the *voir dire* has been a public process throughout Anglo-American history. The Court added that “the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”

The rise of anonymous juries

One extreme form of jury secrecy is keeping the identities of jurors totally secret. Anonymous juries are a recent, and increasingly popular, phenomenon. The first fully anonymous jury empanelled in the United States was the 1977 trial of drug kingpin Leroy Barnes in New York City. There, the trial court reviewed the “sordid history” of jury and witness tampering in large-scale New York drug prosecutions and concluded that “all safety measures possible should be taken for the protection of prospective jurors, including complete anonymity, namely, no disclosure of name or address.”

By the mid-1990s, some courts were using anonymous juries regularly, prompting a cat-and-mouse game where local policies stand until an appellate court strikes them down. A county court in Ohio, for example, empanelled anonymous juries in all cases, civil and criminal. Similarly the Los Angeles Superior Court has used several methods for more than a decade to shield juror identities.

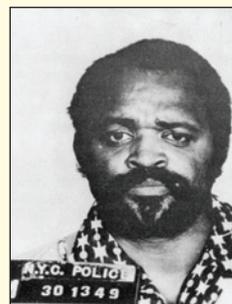
And the Judicial Conference of the United States, a body that governs the federal courts, said in 2004 that “documents containing identifying information about jurors or potential jurors” should “not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access.”

The policy was intended to prevent electronic access to juror identities during trial and does not prevent post-trial access to the identities, which are available in the jury management database maintained by each federal district court. But court employees appear confused about what the policy requires, very often refusing to release juror information even when it should be public under federal law. The constitutionality of the policy has not yet been litigated in the federal courts.

Despite the recent popularity of anonymous juries, most federal and state appellate courts which have addressed this issue have recognized a qualified First Amendment right to juror names and addresses. (*In re Disclosure of Juror Names and Addresses*). The U.S. Court of Appeals in Atlanta (11th Cir.) called the use of anonymous juries “a drastic measure, one which should be undertaken only in limited and carefully delineated circumstances.” (*U.S. v. Ross*).

Most federal appellate courts have decided whether to withhold juror identities based on some combination of the following five factors: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential that the defendant will get a long jail sentence or substantial fines if convicted; and (5) extensive publicity that could expose jurors to intimidation or harassment. (*U.S. v. Sanchez*).

Another installment of the *Secret Justice* series deals with the problem of anonymous juries in depth. It can be found at www.rcfp.org/secretjustice/anonymousjuries.



Leroy Barnes

The demanding standard for closure of *voir dire* proceedings used in *Press-Enterprise I* is similar to other proceedings to which a First Amendment right of access applies — the presumption of openness “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”

The interest must be clearly articulated “along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Voir dire* could be closed, for example, where “interrogation touches on deeply personal matters that a person has legitimate reasons for keeping out of the public domain.”

The *Press-Enterprise I* Court also offered advice for trial judges



AP Photos

A judge let jurors define their own privacy interests in the 1987 perjury trial of Reagan White House official Michael Deaver. (*CNN v. U.S.*)

concerned about particularly embarrassing *voir dire* questions. The Court said a trial judge should inform prospective jurors that if they believe public questioning will be embarrassing, they can ask for an opportunity to discuss the problem with the judge outside of public view but with counsel and a court reporter present. If the court then orders a limited closure, the interest in openness should still be observed “by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror’s valid privacy interests.”

Using this procedure, a Massachusetts court found closure was allowed under *Press-Enterprise I* where the trial judge “allowed the courtroom to be closed in response only to specific requests made by potential jurors to protect their privacy, and only during the discussion of private matters; [and] she immediately reopened the courtroom for any additional questioning of each of the potential jurors once questioning on the private matters was completed.” (*Commonwealth v. Jaynes*).

Access versus privacy

Appellate courts have made clear that a general interest in juror privacy is not a good enough reason to exclude the public from *voir dire*. For example, the U.S. Court of Appeals in New Orleans (5th Cir.) reversed a trial court order that closed all individual questioning to the public on the assumption that “the individual questioning of potential jurors predictably will raise questions that may infringe upon the venire members’ privacy and that their responses may be more candid if provided in private.” (*In re Dallas Morning News Co.*). The court found that instead of closing portions of *voir dire* on the assumption that there will be privacy concerns, the judge should tell prospective jurors “that any of them may request to be questioned privately, in the presence only of court personnel, the parties, and the attorneys.”

Nor may a court simply take a prospective juror’s claim of a privacy interest at face value, as the federal appellate court for Washington, D.C. made clear when it reversed a trial court judge who declined to independently evaluate jurors’ assertions of a privacy interest. The court noted that the Supreme Court’s *Press-*

Enterprise decisions “require[] the trial court to determine whether a juror’s request is ‘legitimate.’” (*Cable News Network, Inc. v. U.S.*).

Access versus the right to a fair trial

A criminal defendant’s Sixth Amendment right to a fair trial can also overcome the presumption of openness under certain conditions.

The U.S. Court of Appeals in Richmond (4th Cir.) identified what it called “one of the few acceptable exceptions to a virtually unanimous rule” in favor of public *voir dire* in *In re Greensboro News Co.* The racially-charged civil rights prosecution involved allegations that the defendants — connected to the Ku Klux Klan and National Socialist Party of America — had murdered civil rights marchers. Among other reasons for closure, the court worried about coverage of the case tainting the jury and noted that alternatives were untenable under the circumstances because sequestering “750 prospective jurors at the outset of the *voir dire* process, while theoretically, perhaps, possible, would impose an intolerable strain.”

The U.S. Court of Appeals in New York (2nd Cir.) reached a similar result in a case involving celebrity boxing promoter Don King. The court worried that prospective jurors would be hesitant to speak honestly about their views on race if they knew their statements would be made public. It found that “this is that unusual case where the fairness of a trial, or at least the *voir dire* phase, that is usually promoted by public access is seriously at risk of being

Grand juries play by their own rules

Grand juries are groups of jurors that decide whether there is enough evidence to take a defendant to trial. Since the 17th century, grand jury proceedings have been closed to the public, and records of these proceedings have been kept from the public eye. The secrecy rule, adopted from England, has become an integral part of the American criminal justice system. For this reason, courts have made clear that there is no First Amendment right of public access to grand jury proceedings. Participants, except witnesses, generally are forbidden from disclosing matters related to the grand jury, even after the grand jury’s activities have concluded.

Rule 6(e)(6) of the Federal Rules of Criminal Procedure provides that records, orders and subpoenas pertaining to grand jury proceedings are kept sealed from the public “to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.” The same is true of court proceedings on matters affecting the grand jury. For example, contempt hearings for witnesses who have refused to testify in front of a grand jury are often held behind closed doors.

One exception to the rule of grand jury secrecy concerns witnesses. The federal rule governing grand jury secrecy places no restriction on witnesses, and “individuals called as witnesses may disclose whatever they wish to the media.” (*U.S. v. Lovachio*). Some courts, however, permit grand jury witnesses to divulge only what they knew *before* they testified.

Other exceptions to this secrecy exist in some states. For example, where a California court “finds that the subject matter of the investigation affects the general public welfare” it may direct the grand jury to conduct its investigation in public sessions. (Cal. Penal Code § 939.1).

Another installment of the *Secret Justice* series deals with the problem of grand juries in depth. It can be found at www.rcfp.org/secretjustice/grandjuries/index.html.



AP Photos

A judge felt jurors might not be candid about their views on racial bias if *voir dire* in boxing promoter Don King's 1987 trial was open to the public, but a similar order was overtuned in Martha Stewart's 2004 trial because there were no "similarly sensitive" questions.

impaired unless some modest limitation on access is imposed." The court added that "surely the public interest in a trial not affected by racial bias will be fostered, in the case of that particular juror, if he or she can express racial views or feelings candidly." (*U.S. v. King*).

Similarly, the Michigan court hearing the first post-Sept. 11 case involving allegations of terrorism to go to trial relied on Don King's case in closing *voir dire*. The court said that it "found that a sizeable number of prospective jurors have strong views about the Middle East, persons of Middle Eastern descent, the Government and terrorism," adding that "[t]he jurors' complete candor is absolutely essential to flesh out their views and biases." The court ruled that a transcript of *voir dire* would be released after the jury was seated. (*U.S. v. Koubriti*).

But the U.S. Court of Appeals in New York (2nd Cir.) went the other way in Martha Stewart's criminal prosecution, overturning an order closing *voir dire*. The court said that in Don King's case "the district judge recognized that potential jurors were unlikely to admit openly to harboring racist views." There was no similar risk to Stewart's right to a fair trial, the court said, because "[n]o similarly sensitive or contentious lines of questioning were here identified by the district court." Moreover, closure requires a specific showing of a particularly

acute risk of prejudice. (*ABC, Inc. v. Stewart*).

Nearly all reported cases deal with access to *voir dire* in criminal cases. However, a New Jersey appellate court applied the same standards for closure of civil *voir dire*, though this case dealt with questioning *after* the jury was empanelled and reached a verdict. The court reversed an order closing *voir dire* because "there is a presumptive right of access to a civil post-verdict jury *voir dire*" and it found "no compelling, overriding interest which would rebut the presumption of access and ... the well-founded concerns of the trial judge could be adequately addressed through less restrictive alternatives than requiring closure." (*Barber v. Shop-Rite of Englewood & Associates, Inc.*).

***Voir dire* transcripts**

The press and the public also enjoy a First Amendment presumption of access to the transcripts of *voir dire* proceedings. The presumption may be overcome by a compelling interest that outweighs the First Amendment right of access. The court must determine that the limitations imposed are both necessary to and effective in protecting that interest.

The Supreme Court in *Press-Enterprise I* recognized a constitutional right of access to *voir dire* transcripts as well as proceedings, noting that in the unusual circumstance where *voir dire* must be held behind closed

doors, the First Amendment requires the judge to release transcripts whenever possible. The federal appellate court in Philadelphia (3rd Cir.) expanded on this in *U.S. v. Antar*, noting "[i]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?"

In that case, *voir dire* was opened to the public, but reporters complied with the judge's request to leave the courtroom due to space limitations and were not able to learn the juror information given in open court, including the names of prospective jurors and the towns from which they came. The press requested transcripts that would reveal the information, but they were sealed by the trial court. The appellate court ordered the transcripts opened, finding no meaningful distinction between *voir dire* proceedings themselves and the transcripts of those proceedings. It concluded that "[t] rue public access to a proceeding means access to knowledge of what occurred there."

As a practical matter, transcripts are often difficult (and expensive) to obtain from the court reporter even if the court unseals them. Reporters should check with the parties to see if they have already ordered transcripts. Alternatively, courts sometimes

have funds set aside to pay for transcripts or the ability to waive fees. Where a hearing has been closed, the court may be willing to make arrangements to minimize the burden on the press and public.

Jury Questionnaires

Courts will sometimes ask jurors to fill out questionnaires, which can be a more efficient way of getting basic information on prospective jurors than asking questions in open court. These questionnaires are part of *voir dire* and thus presumptively public. But courts may redact highly personal information that does not serve the goals of openness, such as Social Security numbers.

The Supreme Court has not addressed whether jury questionnaires are subject to the same presumption of openness as *voir dire* proceedings, but lower courts have. In *Lesher Communications, Inc. v. Superior Court*, a California court concluded that the presumption of openness applies to questionnaires as well as to oral questioning, because “[t]he fact that a lawyer does not orally question a juror about a certain answer does not mean that the answer was not considered in accepting or rejecting the juror.”

The Ohio Supreme Court agreed, reasoning that “[t]he fact that a lawyer elicits juror responses from written questions rather than oral questions has no bearing on whether the responses are considered in accepting or rejecting a juror.” The court cited cases from around the country and added that “virtually every court having occasion to address this issue has concluded that such questionnaires are part of *voir dire* and thus subject to a presumption of openness.” (*Beacon Journal Publishing v. Bond*).

Still, courts may — and sometimes must under local or state rules — redact highly personal information that doesn’t further the objectives underlying the right of access. Thus, the Ohio Supreme Court found that despite the presumption of openness in questionnaires, “certain questions will invariably elicit personal information that is relevant only to juror identification and qualification, rather than for the selection of an impartial jury.” The court said that “these questions — such as those that elicit [a] Social Security number, telephone number, and driver’s license number — are not properly part of the *voir dire* process and should be redacted from the questionnaires prior to disclosure.”

Absent unusual circumstances, media intervenors seeking access to questionnaires generally have no objection to redacting Social Security numbers and similarly sensitive information. Indeed, it is often good strategy to suggest such redactions as less restrictive alternatives to sealing.

Interviewing Jurors

Another question courts struggle with is the extent to which they can control contact between jurors and the press, both during and after the trial. Such restrictions pit the First Amendment rights of jurors and journalists against the interest of the court in the fair and efficient administration of justice.

During trial, the fair administration of justice is generally considered more important than free speech rights and courts clearly have the authority to prevent the press from interviewing jurors about the proceedings. For this reason, a Colorado appellate court affirmed a contempt citation against reporters who attempted to interview jurors that were preliminarily qualified for the jury, requiring the court to dismiss the jury and repeat the juror selection process. The court found that “once

the trial process had begun, respondents’ First Amendment rights did not extend to permit communication with prospective jurors who had been admonished not to discuss the pending case” because “the risk of prejudice to the fair administration of justice is so high if such conduct were permitted ... that any benefit to be derived by the public from the publication of the jurors’ views is overridden.” (*In re Stone*).

But after a verdict is rendered, there is no more jury deliberation to protect. Post-verdict limitations on interviewing jurors are considered presumptively invalid “prior restraints” on speech, and the party seeking to limit juror interviews must show that such interviews would “pose[] a clear and present danger or a serious and imminent threat to a protected competing interest.” In addition, the restraint must be as narrow as possible “and no reasonable alternatives,

You have a right to challenge court secrecy

The public and the press have a right to be heard on the issue of access to court proceedings and records, including those related to juries. In *Globe Newspaper Co. v. Superior Court*, the Supreme Court said that “representatives of the press and general public ‘must be given an opportunity to be heard on the question of their exclusion.’”

While it is clear that reporters (and the general public) have the right to challenge court secrecy, courts differ regarding the best method for asserting the right to access. One option is to intervene for the limited purpose of requesting access — the Supreme Court in *United Nuclear Corp. v. Cranford Ins. Co.* said that “courts have widely recognized that the correct procedure for a non-party to challenge a protective order is through intervention for that purpose.” Indeed, some courts say that the press or public *must* move to intervene in order to challenge closure. For example, the Virginia Supreme Court said that it was improper to issue a writ of *mandamus* — an order from a higher court that records be released or the hearing be opened — because intervention was the proper method for challenging closure. (*Hertz v. Times-World Corp.*)

On the other hand, a few courts prefer that the press ask for a writ of *mandamus*, and some have questioned whether the media may properly intervene to request access, especially in criminal trials. In *In re Globe Newspaper Co.*, for example, the U.S. Court of Appeals in Boston (1st Cir.)

found that “the right of a non-party to intervene in a criminal proceeding is doubtful.”

While this uncertainty can be frustrating, many courts allow a less formal challenge. For example, if there is a hearing prior to the closure, you can identify yourself as a reporter and politely assert your right to observe court proceedings.

If there is no opportunity to object in person, you can write a letter to the judge (or the chief judge if you cannot determine who is presiding over the case). You should file the letter with the clerk’s office and send copies to the parties if you can find out who they are. Your letter can say that you understand there will be a closed hearing at the time listed, and respectfully request that the hearings be opened. If the court does not do so, it should at least issue on-the-record findings that there is a compelling interest in closure and that there is no other way to serve that interest. Finally, you can ask the court to give the press and the public a chance to challenge the closed hearings in open court before they occur.

Often, this is enough to unseal the hearing, or at least find out more information about the case. If your letter is ignored, or your request is rejected, you should talk to the Reporters Committee or a local media lawyer about other options for challenging secret court proceedings.

having a lesser impact on First Amendment freedoms, must be available.” Thus, the U.S. Court of Appeals in San Francisco (9th Cir.) struck down an order prohibiting the media from contacting jurors (sometimes called a “no-contact order”) because after trial “there was no possibility that allowing the jurors to speak to newsmen would deprive [the defendants] of a fair trial.” (*U.S. v. Sherman*).

Similarly, the U.S. Court of Appeals in New Orleans (5th Cir.) invalidated a trial court rule that prohibited questions concerning the deliberations or the verdict of the jury. The court noted that it might approve “a rule narrowly tailored to prevent the disclosure of the ballots of individual jurors or some other paramount value,” but added that the worry “[t]hat unrestrained post-verdict inquiry into every juror’s vote and every jury’s deliberations in every trial might be harmful cannot validate a categorical denial of all access.” (*In re Express News Corp.*). And in *Journal Publishing Company v. Mechem*, the U.S. Court of Appeals in Denver (10th Cir.) invalidated a post-trial no-contact order as it applied to press, finding that “while a court may broadly proscribe attorney and party contact with former jurors, it does not have the same freedom to restrict press interviews with former jurors.”

Still, courts have occasionally approved limited restrictions in unusual cases, allowing limitations on repeated requests for



AP Photo

Reporters were barred from contacting jurors after the 2001 mistrial of Rabbi Fred J. Neulander, who was later convicted of hiring a hitman to kill his wife. The New Jersey Supreme Court ruled that interviews might prejudice a subsequent jury.

interviews or discussions of jury deliberations or other juror’s votes. For example, the *Mechem* court said that a judge can instruct jurors that they may refuse interviews or tell them “not to discuss the specific votes and opinions of noninterviewed jurors in order to encourage free deliberation in the jury room.”

In a high-profile case involving the mur-

der of a federal judge, the federal appellate court in New Orleans (5th Cir.) upheld an order that prohibited repeated requests for interviews, as well as questioning one juror about how others voted. (*U.S. v. Harrelson*). The court reasoned that “[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.” The same court later upheld a rule prohibiting reporters from asking about “the discussions about the case occurring among jurors within the sanctity of the jury room” but allowed questions about a juror’s own “general reactions” to the proceedings. (*U.S. v. Cleveland*).

In an unusual case, the New Jersey Supreme Court upheld restrictions on press contact with jurors following an inconclusive murder trial that was certain to result in the defendant’s imminent retrial. That court allowed restrictions on media contact with jurors, on the ground that interviews might “reveal some insight into the jury’s deliberative process that would afford the prosecution a significant advantage at the retrial,” which would violate the defendant’s Sixth Amendment right to a fair trial. (*New Jersey v. Neulander*).

Of course, jurors are always free to decline interviews with the press, and the court may instruct them that they can refuse to speak with the press.

Cases Cited

- ABC, Inc. v. Stewart*, 360 F.3d 90 (2nd Cir. 2004)
Barber v. Shop-Rite of Englewood & Associates, Inc., 923 A.2d 286 (N.J. Super. A.D. 2007)
Beacon Journal Publishing v. Bond, 781 N.E.2d 180 (Ohio 2002)
Cable News Network, Inc. v. U.S., 824 F.2d 1046 (D.C. Cir. 1987)
Commonwealth v. Jaynes, 770 N.E.2d 483 (Mass. App. 2002)
Gannett Co. v. Delaware, 571 A.2d 735 (Del. 1990)
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)
Hertz v. Times-World Corp., 528 S.E.2d 458 (Va. 2000)
In re Dallas Morning News Co., 916 F.2d 205 (5th Cir. 1990)
In re Express News Corp., 695 F.2d 807 (5th Cir. 1982)
In re Greensboro News Co., 727 F.2d 1320 (4th Cir. 1984)
In re Globe Newspaper Co., 920 F.2d 88 (1st Cir. 1990)
Journal Pub. Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986)
Lesher Communications, Inc. v. Superior Court, 224 Cal. App. 3d 774 (1990)
NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337 (Cal. 1999)
New Jersey v. Neulander, 801 A.2d 255 (N.J. 2002)
Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978)
Ohio v. Hill, 749 N.E.2d 274 (Ohio 2001)
Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501 (1984)
Press-Enterprise Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1 (1986)
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
U.S. v. Antar, 38 F.3d 1348 (3rd Cir. 1994)
U.S. v. Barnes, 604 F.2d 121 (2nd Cir. 1979)
U.S. v. Cleveland, 128 F.3d 267 (5th Cir. 1997)
U.S. v. Harrelson, 713 F.2d 1114 (5th Cir. 1983)
U.S. v. King, 140 F.3d 76 (2nd Cir. 1998)
U.S. v. Koubriti, 252 F. Supp. 2d 424 (E.D. Mich. 2003)
U.S. v. Lovecchio, 561 F. Supp. 221 (M.D. Pa. 1983)
U.S. v. Ross, 33 F.3d 1507 (11th Cir. 1994)
U.S. v. Sanchez, 74 F.3d 562 (5th Cir. 1996)
U.S. v. Sherman, 581 F.2d 1358 (9th Cir. 1978)
United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424 (10th Cir. 1990)

Your First Amendment Newsstand



The Reporters Committee for Freedom of the Press is committed to helping journalists understand the laws that affect newsgathering. And we have a wide array of publications that can help.

We've got special reports like **Homefront Confidential**, an examination of access and information policy issues in a post-September 11 world.

Our **Reporter's Privilege Compendium** offers a detailed look at each state's shield laws and court decisions that affect the ability of reporters to keep their sources and information confidential.

For help with gaining access to government records and meetings, we've got **How to Use the Federal FOI Act**. Or for state

law help, there's the **Open Government Guide**, a complete guide to each state's open records and meetings acts. Also, **Access to Electronic Records** tracks developments in the states regarding computerized release of data.

And of course, there's the **First Amendment Handbook**, a guide to almost every aspect of media law with practical advice for overcoming barriers encountered every day by journalists.

For these and many more publications, visit our Web site. Read these guides online — for no charge — or purchase a copy to read in print.

Visit our online First Amendment newsstand at:
www.rcfp.org/publications