Volume 53 | Issue 5 Article 6

2008

Sealing, Judicial Transparency and Judicial Independence

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SEALING, JUDICIAL TRANSPARENCY AND JUDICIAL INDEPENDENCE

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THE rule of law is the proud boast of many societies, but the hard-earned achievement of far fewer. In part, this is so because the *sine qua non* of the rule of law is an independent judiciary, a delicate institution both difficult to establish and no less difficult to sustain. Our history tells us that judicial independence must first be constitutionally conferred and guaranteed, and then, importantly, it must be earned and periodically redeemed by the judiciary through its actions.[1] In other words, judicial in-

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1. Because views vary on the proper scope and content of judicial independence, it may be useful to state briefly here my view on the core of this important concept. The starting point in defining the scope and content of judicial independence must be Article III, Section 1 of the United States Constitution, which provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. Thus, federal judges enjoy life tenure and may not be removed from office except by way of impeachment, trial and conviction by the United States Senate. And importantly, judges' salaries may not be reduced during their tenure, although judges are not saved from the ravages of inflation. *See* Atkins v. United States, 556 F.2d 1028, 1048 (Ct. Cl. 1977) (explaining that Constitution grants Congress discretion to adjust judges' salaries as economic circumstances require, and mere existence of inflation without equivalent increase in judicial salaries did not violate Compensation Clause). Also, federal judges, unlike continental magistrates, may not be transferred or demoted, nor may they be removed from a case or class of cases except by the judicial branch on a showing of actual bias:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein.

28 U.S.C. § 144 (1948). And importantly, neither the Executive Branch nor the Legislative Branch may call a judge to account for his or her decisions. Judges receiving requests or subpoenas to do so should politely but firmly decline. *See* Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1 (noting House Judiciary Committee's threat to subpoena records of Judge James Rosenbaum and citing alleged "pattern of hostility" in his sentences). Of course, judicial independence does not immunize a judge from public criticism from any quarter; such criticism is protected by the First Amendment, and the constitutional guarantee of judicial independence is the armor that shields judges from any effect of the criticism on a judge's job or tenure. This does not mean that it is prudent for judges to refuse to consider whether any criticism might be

dependence is required for judges to do justice, and that independence can only survive as long as judges in fact do justice. And, as the familiar maxim teaches, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[2]

From this, it follows that judicial independence depends to some degree on the maintenance of judicial transparency; what judges do—the process and product of adjudication—must be largely open to public scrutiny, else risk giving rise to a threat to judicial independence. Secret proceedings, including unwarranted or excessive sealing of court records, engender suspicion, mistrust and a lack of confidence in the judicial process and, if not rare and well understood as necessary, such proceedings will likely lead to attempts to limit judicial authority and independence.

Once the connection between judicial independence and judicial transparency is recognized and understood, a related and important point becomes clear: because judges control the sealing of judicial documents and proceedings, they have an important role to play in enhancing the transparency of judicial action and hence in sustaining judicial independence. By taking care—and taking steps—to ensure that sealing is (1) minimized and (2) justified or explained on the public record, judges will help ensure their independence *qua* judges.[3] This is the simple thesis of this Article. To advance this thesis, this Article begins by briefly clarifying the concept of transparency, and then by reviewing, equally briefly, the legal landscape of sealing principles and requirements, offering along the way very modest suggestions designed to enhance judicial transparency and thereby preserve judicial independence.

I.

By judicial transparency, I simply mean the general public's ability to monitor and examine what happens in the administration of the federal civil and criminal justice systems. Of course, this ability to monitor and examine extends beyond simply knowing who is or was prosecuted, for what and with what result, or who is or was suing whom, for what and with what result. Rather, it extends to the ability to attend and view proceedings, to examine the filed pleadings and documents and to examine the results of the process as may be reflected in a judge's decision or opinion

valid. Also important on the issue of judicial independence is the fact that Congress retains the power to limit federal court jurisdiction, although the nature and extent of this power is debatable. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 169-206 (4th ed. 2003) (discussing Congress's power to limit jurisdiction of federal judiciary).

2. Rex v. Sussex Justices, 1 K.B. 256, 259 (1924).

3. Of course, transparency has beneficial effects in addition to bolstering judicial independence. As Professor Resnik has thoroughly and eloquently explained at this Symposium, transparency plays an integral role in the functioning of democratic government, allowing citizens to monitor their elected (and unelected) government officials and make informed choices at the ballot box. *See* Judith Resnik, *Courts: In and Out of Sight, Site and Cite*, 53 VILL. L. REV. (2008).

and a jury's verdict. Although this description of transparency is straightforward and uncontroversial, there is a further subtlety to the concept that warrants description here.

Transparency is a function of both technology and public expectations, and both of these factors vary over time. This point is easily illustrated. At the time of the founding and through a substantial part of the nineteenth century, judicial transparency meant chiefly that court proceedings were open to the public. Indeed, in many communities, courthouse proceedings were a popular, if not the sole, source of public entertainment. Court pleadings and documents, in general, were only irregularly publicly available, but this was apparently not a major public concern, as apart from the legal community, the public seemed little interested in court pleadings or documents. This changed toward the end of the nineteenth century, and by the twentieth century the public had come to expect and demand access not just to live court proceedings, but to court pleadings and documents as well. Thus, by the time I was appointed to the federal bench in 1987, publicly acceptable judicial transparency consisted of public attendance at court proceedings and the ability to review and copy all unsealed court pleadings and documents. Time has since wrought further changes.

The technological revolution brought about by the advent and maturity of computers and the internet has changed what is required for adequate judicial transparency, no less than it has changed so much else in our lives. Electronic filing and paperless docketing have transformed the way the courts do business and the way in which the public interacts with the courts. No longer is it necessary for a citizen to go to the clerk's office at the courthouse to review court records; now, with a PACER account, any individual with access to an internet connection can access and review court documents from his or her home, office, school or public library—or even, thanks to the recent explosion in wireless technology, an individual's local coffee shop.[4] These technological advances have the potential to facilitate judicial transparency in obvious ways, lowering the practical costs of access to court documents for many members of the public.[5] Less obviously, but no less importantly, these technological advances have also stimulated a shift in the public's appetite for access to court records. As citizens have grown accustomed to having a wealth of knowledge at their fingertips via the internet and various search engines, their appetite (especially among academics) to consume court data in searchable, statistically

4. PACER (Public Access to Court Electronic Records) is "an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts." *See* What is Pacer?, http://pacer.psc.uscourts.gov/pacerdesc.html (last visited Apr. 9, 2008).

5. It should be noted that those without access to the internet or PACER may still review documents at the courthouse and may request copies of those documents, for a modest per-page fee.

analyzable form has understandably grown. An example from a conference discussion nicely illustrates this point.

Conference participants report that academics and practitioners seek to have access to sentencing data by judge. This data, as a practical matter, is not publicly available. Judgment and commitment orders setting forth the sentence imposed in each case, the reasons in support thereof and the related Sentencing Guidelines calculations are typically public documents and may be individually reviewed to discover the identity of the sentencing judge; this would be a laborious and time-consuming undertaking. As it happens, the Administrative Office of the United States Courts and the Sentencing Commission have this data in a form that identifies the sentencing judge and in a form that is searchable by judge. Yet, by virtue of an agreement among the Sentencing Commission, the Judicial Conference of the United States and the Administrative Office of the United States Courts, this data is not publicly available.[6]

Were this data available to academics and practitioners, academics would be able to analyze and criticize the sentencing practices of specific judges or districts. Moreover, practitioners would be able to argue to a judge in a particular case that his or her past sentences were more severe than those imposed by the judge's colleagues and that the judge should therefore impose a less severe sentence in the case at bar in order to avoid a prohibited unwarranted disparity.[7] Putting aside the merits of any such argument (either in general or in a specific case), there is no persuasive reason to conclude that such an argument never deserves to be made and that the data should be made publicly available only in a form that effectively precludes academics and practitioners from scrutinizing and analyzing sentences imposed by specific judges.

This is just one example of the way in which changing technology affects the public's appetite for information concerning court proceedings. This in turn changes and affects the requirements for judicial trans-

6. *See* THE CHIEF JUSTICE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 20 (Mar. 18, 2003), *available at* http://www.uscourts.gov/judconf/marc03proc.pdf (recognizing continued applicability of agreement); THE CHIEF JUSTICE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 88 (1995) (justifying agreement based on "the potential for judge-specific information taken out of context to be misinterpreted"); THE CHIEF JUSTICE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 21 (1995) (same). The fact that data may be misinterpreted and judges may be criticized is not a valid reason to withhold information. Criticism of judges, whether valid or invalid, is the very reason judges have independence.

7. *See* 18 U.S.C. § 3553(a)(6) (2000) ("The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . .").

parency.[8] The essential transparency principle is clear: given the ease with which the information about court proceedings and the administration of justice can be made publicly available with new technology, and given the public's expectations created by this ease of access, it follows that judicial transparency *today* requires that (unless the law dictates otherwise) civil and criminal court proceedings and data should be made public in a form that does not conceal the judge's identity or otherwise hamper statistical or other analyses. As it happens, the existing governing law on sealing court pleadings and documents is generally consistent with this principle.

II.

The starting point in reviewing the landscape of opinion sealing is to examine the roots of the public's constitutional and common law rights of access to judicial proceedings. These rights properly limit a court's ability to close judicial proceedings by sealing court records or proceedings. A review of the history and scope of these rights is the necessary first step in identifying the proper use and limits of sealing.

The First Amendment's right of access to judicial records is rooted in a more general right of public access to judicial proceedings, and specifically to criminal trials.[9] As the Supreme Court noted in *Globe Newspaper Co. v. Superior Court*,[10] the right of access to trials is based on two particular features of the criminal justice system.[11] First, the criminal trial has historically been open to the public—a presumption of openness that significantly predates the Constitution.[12] And second, public access to, and scrutiny of, criminal trials plays a vital role in safeguarding the integrity of the judicial process and, through it, of government as a whole.[13] In particular, public access "fosters an appearance of fairness" and "permits the public to participate in and serve as a check upon the judicial process."[14] Together, these features create a strong presumption against the restriction of public access to court proceedings. Although the First Amendment does not compel public access to every type of proceeding,[15] the Supreme Court has made clear that a proceeding is subject to the First

8. Although the agreement not to disclose sentencing information by judge is not strictly speaking a sealing decision, it is in effect the same thing because it precludes practical review of a particular judge's sentencing decisions.

9. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-06 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563-64 (1980).

10. 457 U.S. 596 (1982).

11. *See Globe Newspaper*, 457 U.S. at 605.

12. *See id.*; *see also Richmond Newspapers*, 448 U.S. at 564-69 (detailing history of public access to criminal trials).

13. *See, e.g., Globe Newspaper*, 457 U.S. at 606.

14. *Id.*

15. *See* Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3 §§ 1-16 (2000 & Supp. 2003, 2005).

Amendment right of public access if it has historically been open to the public and if public access promotes judicial integrity.[16]

Although the Supreme Court has not specifically extended this First Amendment right of public access to civil proceedings,[17] a number of circuit courts have done so, sensibly finding that the same considerations of experience and logic apply equally in the civil and criminal contexts.[18] When it applies, the constitutional right of public access is powerful: it may only be denied on the basis of a compelling governmental interest, and only when the denial is narrowly tailored to serve that interest.[19] But it is also narrow, as it only applies to particular judicial records and documents, such as documents filed in connection with plea hearings and sentencing hearings in criminal trials, and documents filed in connection with summary judgment motions in civil cases.[20]

A common law right of access to court documents and records exists that is distinct from the constitutional right.[21] Like the First Amendment right, this common law right is based on the importance of public oversight in maintaining judicial transparency.[22] Despite sharing a common genesis, the common law and constitutional rights differ in important respects. The common law right is much broader; it has been held to apply generally to *all* judicial records and documents, not the subset to which the First Amendment may apply.[23] Although the common law right of access applies more broadly, it applies with less force. The common law presumption in favor of public access can be overcome if it is merely outweighed by countervailing interests, even if those interests are not necessarily compelling, and even if the restriction on access is not narrowly tailored to serve those interests.[24] And whereas a trial court's adjudication of the First Amendment right is reviewed de novo on appeal,[25] application

16. *See* Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 8-9 (1986).

17. *But see Richmond Newspapers*, 448 U.S. at 580 n.17 ("[W]e note that historically both civil and criminal trials have been presumptively open.").

18. *See, e.g., In re* Providence Journal Co., 293 F.3d 1, 13 n.5 (1st Cir. 2002); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984).

19. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984); Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988).

20. *See Stone*, 855 F.2d at 180; Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); *In re* Wash. Post Co., 807 F.2d 383, 390 (4th Cir. 1986).

21. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978); *see also* United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995); *Stone*, 855 F.2d at 180.

22. *See Nixon*, 435 U.S. at 597-98 ("The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.") (citations omitted).

23. *See Stone*, 855 F.2d at 180.

24. *See id.*; *see also* Newman v. Graddick, 696 F.2d 796, 803 (11th Cir. 1983) (discussing courts' need to balance interests when considering public's access to judicial records).

25. *See* Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 575 (4th Cir. 2004).

of the common law right is left to the trial court's discretion and reviewed deferentially.[26]

Although the constitutional and common law rights differ somewhat in breadth and strength, they share a common process of application. When presented with a sealing request based on either the First Amendment or the common law right of access, courts must follow certain procedures before sealing a judicial document or record; which procedures can be found in circuit precedents[27] and court rules.[28] The precise requirements differ somewhat from circuit to circuit, but the basic process is broadly similar: a court seeking to seal a document or proceeding must (1) give public notice of the potential sealing and provide interested parties with an opportunity to object; (2) state the reasons for sealing on the public record; and (3) explain why alternatives to sealing are inadequate.[29]

Of these three steps, the second is the most important—and often the most difficult to satisfy. In this regard, courts have identified a number of good reasons to seal court documents. For instance, documents detailing trade secrets may appropriately be sealed, because publication would destroy the value of the secret and likely defeat the purpose of the litigation.[30] Sealing is also appropriate to protect privacy interests, provided those interests are sufficiently well-defined and outweigh the public's rights of access.[31] Qualifying privacy interests likely include medical

26. *See Nixon*, 435 U.S. at 599 ("[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."); *Stone*, 855 F.2d at 180.

27. *See, e.g.*, Ashcraft v. Conoco, Inc., 218 F.3d 288, 302 (4th Cir. 2000); *In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984); *see also* Hagestad v. Tragesser, 49 F.3d 1430, 1434-35 (9th Cir. 1995); SEC v. Van Waeyenberghe, 990 F.2d 845, 848-50 (5th Cir. 1993); United States v. Valenti, 987 F.2d 708, 713 (11th Cir. 1993); City of Hartford v. Chase, 942 F.2d 130, 135 (2d Cir. 1991); Johnson v. Greater Se. Cmty. Hosp. Corp., 951 F.2d 1268, 1277-78 (D.C. Cir. 1991); *In re* Globe Newspaper Co., 920 F.2d 88, 91 (1st Cir. 1990); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253-54 (4th Cir. 1988); *In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 574 (8th Cir. 1988); United States v. Beckham, 789 F.2d 401, 411 (6th Cir. 1986); United States v. Hickey, 767 F.2d 705, 708-09 (10th Cir. 1985); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071-72 (3d Cir. 1984); Matter of Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1313 & 1313 n.17 (7th Cir. 1984); *Newman*, 696 F.2d at 802.

28. *See, e.g.*, 1ST CIR. R. 11; 1ST CIR. R. 30(f); 3D CIR. R. 106.1; 4TH CIR. R. 25(c); 6TH CIR. R. 28(h); 7TH CIR. I.O.P. 10; 9TH CIR. R. 27-13; 10TH CIR. R. 11.3; 10TH CIR. R. 30.1; D.C. CIR. R. 47.1.

29. *See Conoco*, 218 F.3d at 302.

30. *See* Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002); *Publicker*, 733 F.2d at 1073.

31. *See In re* Knoxville News-Sentinel Co., 723 F.2d 470, 474-76 (6th Cir. 1983) (denying newspapers' request to unseal bank records containing customers' financial and personal information).

records,[32] personal financial information[33] and social security information;[34] a minor's personal information also falls in this category.[35] In criminal cases, sealing is often required by rule or statute. For instance, given the long-recognized importance of secrecy in grand jury proceedings, materials relating to such proceedings are kept secret pursuant to Rule 6 of the Federal Rules of Criminal Procedure.[36] Similarly, matters affecting national security must often be sealed pursuant to the Classified Information Procedures Act (CIPA),[37] or pursuant to the assertion of the Executive Branch's common law privilege.[38]

Perhaps more pertinent given the focus of this Article is a listing of those reasons that do not justify sealing. A common, although not always explicit, reason proffered for sealing is a party's fear of embarrassment. It is pellucidly clear that this reason cannot justify sealing; the public's rights of access should never be outweighed by the risk of embarrassment or harm to reputation.[39] Nor should a document be put under seal merely because the parties jointly request or agree to the sealing.[40] And, of course, it is not enough simply to cite a legitimate reason to seal documents; the party seeking the seal must establish a connection between the document the party seeks to seal and the reason he or she gives for sealing it.[41]

The case law concerning sealing procedures is fairly well-developed.[42] Similarly, the constitutional and common law rights of public access are well-established, and common procedures for balancing these rights

32. *See* Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376-77 (8th Cir. 1990).

33. *See In re* Boston Herald, Inc., 321 F.3d 174, 190 (1st Cir. 2003).

34. *See* Earle v. Aramark Corp., 247 F. App'x 519, 525-26 (5th Cir. 2007).

35. *See Jessup*, 277 F.3d at 928.

36. *See* Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218-19 (1979); Wash. Post v. Robinson, 935 F.2d 282, 290-92 (D.C. Cir. 1991); United States v. Haller, 837 F.2d 84, 87-88 (2d Cir. 1988).

37. 18 U.S.C. app. 3 §§ 1-16 (2000 & Supp. 2003, 2005). For a description of the application of CIPA in a specific context, see *United States v. Rosen*, 520 F. Supp. 2d 786, 790 (E.D. Va. 2007). CIPA represents a Congressional determination that the government's interest in secrecy for certain matters outweighs the public's right of access.

38. *See* United States v. Reynolds, 345 U.S. 1, 6-7 (1953); *see also* Rosen, 520 F. Supp. 2d at 809 (discussing application of *Reynolds* privilege).

39. *See* Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983) ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records.").

40. *See* Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 546 (7th Cir. 2002) ("Despite these principles, the parties' joint motion made no effort to justify the claim of secrecy. It was simply asserted, mostly on the basis of the agreement . . . . That won't do.").

41. *See* Kamakana v. City of Honolulu, 447 F.3d 1172, 1184 (9th Cir. 2006) ("Simply mentioning a general category of privilege, without any further elaboration or any specific linkage with the documents, does not satisfy the burden.").

42. For a further discussion of the case law, see *supra* note 27.

against the occasional need for secrecy or discretion have been widely adopted.[43] In essence, there is widespread agreement among the courts regarding the sorts of interests that may outweigh the public's right of access. Given this legal landscape, it is appropriate now to consider what further steps might be taken to ensure that sealing is minimized, transparency maximized and judicial independence thereby enhanced.

III.

1. To begin with, no case, whether civil or criminal, should be litigated entirely under seal. This point is well established in our jurisprudence, and in English jurisprudence before the American Revolution. As Justice Black wrote in *In re Oliver*,

> Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641 . . . .[44]

The same should hold true in civil trials. My imagination is no doubt poverty-stricken, but I can think of no sound reason that would justify placing a civil case entirely under seal, and placing a criminal case entirely under seal would plainly violate various constitutional strictures.[45] There are often, of course, very good reasons to place portions of the litigation record under seal, but to place the entire matter under seal removes the case from the possibility of public scrutiny.

Placing a matter entirely under seal is the antithesis of judicial transparency, and it has two principal pernicious effects. First, it immunizes the proceedings from the public scrutiny that is necessary to sustain the judiciary's legitimacy. It is the place of the judiciary to interpret and apply the law, and federal judges, by virtue of their independence, are free to the greatest possible extent from the pressures of public opinion and political interference in carrying out this task. But it remains the duty of a

43. *See id.*

44. 333 U.S. 257, 266 (1948).

45. It has been suggested that a worthy candidate for complete sealing is a False Claims Act (FCA) case that is non-suited by a relator, with the government's approval, before the government has determined whether to intervene and prosecute the case. *See* 31 U.S.C. § 3730 (2000). In these circumstances, a relator typically wishes to have the matter remain under seal, so that his or her employer will not learn of the relator's action and perhaps retaliate in some way against the relator. Courts should resist the request for continued sealing of the record as the relator's proffered reason does not constitute good cause; the FCA prohibits such retaliation and provides an effective remedy. *See* § 3730(h). In these circumstances, courts should decline the request for complete sealing of the case. At the very least, courts should issue orders that disclose the existence of the FCA complaint and record the fact of the nonsuit.

watchful public to evaluate the judiciary's actions, and to amend the law when the judicial interpretation meets public disfavor. Obviously, the beneficent—even curative—effect of public scrutiny is impossible when judicial actions are hidden from view. And public scrutiny serves other important social functions by demonstrating that justice is being done. As Chief Justice Burger put it:

> [T]he open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers.[46]

Removing judicial proceedings from public view deprives the public of the vital opportunity to see whether justice is being done.

The second pernicious effect of sealing cases in their entirety is a corollary to the first: by depriving the public of the opportunity to see that justice is being done, secret judicial proceedings increase the risk of actual or perceived injustice. Experience shows that public scrutiny of judicial activity is necessary to prevent abuses of judicial power.[47] In addition, even if under seal trials do not in fact involve judicial abuses, secrecy encourages a perception of abuse, which in turn erodes public confidence in judicial institutions and ultimately will lead to attacks on, and erosion of, judicial independence.

Research conducted to date suggests that the number of cases placed entirely under seal is likely vanishingly small.[48] Yet the principles that militate against total sealing of cases apply with similar force to any request to seal court proceedings or records and with particular force where such

46. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980).

47. *See In re* Oliver, 333 U.S. at 270.

48. Thus, my district—the Eastern District of Virginia—reports that a search discloses no completely sealed cases in this district. Yet, some instances of completely sealed cases clearly exist elsewhere. *See* Jamie Satterfield, *Monicer Fighting Federal Court Ban*, KNOXVILLE NEWS-SENTINEL, Mar. 7, 2008, at 1 (reporting under seal proceedings barring Tennessee lawyer from practicing before federal courts). Interestingly, two Seventh Circuit judges have recently expressed concern that courts may be imprudently sealing entire cases. Then-Chief Judge Joel Flaum, in a June 13, 2006 letter to the chair of the Committee on the Rules of Practice and Procedure, expressed concern regarding the complete sealing of cases.
To the same effect, Judge Flaum's successor, Chief Judge Frank Easterbrook, in a February 22, 2007 letter to the Director of the Administrative Office of the United States Courts, reiterated Judge Flaum's concerns and proposed further inquiry into the frequency of entirely sealed cases. In response, the Committee on the Rules of Practice and Procedure established an Ad Hoc Committee to explore this issue and consider whether an appropriate federal rule of procedure on sealing should be promulgated. I serve on that Committee, which, with the able assistance of the Federal Judicial Center, is undertaking a study to determine the extent of the practice of sealing entire cases within the federal justice system.

requests are cumulative. It is of vital importance, therefore, that courts confronted with requests to seal records keep in mind the tension between sealing court records and maintaining a transparent and just judiciary.

2. Second, documents should not be placed permanently under seal. Permanent sealing is both pernicious and unnecessary. It is pernicious for all the reasons already canvassed that counsel against secrecy in court proceedings, including the potential for this practice to conceal abuses by judges or parties—indeed, even providing an incentive for such abuses. Further, where the participants in certain court proceedings, including the judge, know the proceedings will be permanently sealed from public scrutiny, they may feel less restrained in their conduct, knowing that they will not be held to account publicly for their actions.

Permanent sealing is as unnecessary as it is pernicious. As discussed previously, courts have recognized relatively few interests that justify curtailing the public's First Amendment and common law rights of access. Each of these interests is limited in its duration or applicability, and although the specific duration is often unknown at the time of sealing, no legitimate interest warrants perpetual protection. Sealing of trade secrets illustrates this point. A trade secret is entitled to protection only as long as it remains a trade secret.[49] Once the information has entered the public domain, the justification for sealing documents detailing that information disappears.

In sum, the duration of a requested seal is no less important than its scope. If records are to be placed under seal, the seal should continue only as long as reasonably necessary in light of the reasons that originally warranted sealing. Where, as may sometimes occur, the proper duration of a seal cannot be accurately forecasted at the time of sealing, then transparency requires that a court periodically reevaluate the reasons for a seal to determine whether the seal continues to be justified.

When a matter is placed under seal in the early phases of litigation, it is prudent to reevaluate the seal as the litigation proceeds through later stages, including, for instance, at the start of trial and following judgment. And where sealing is appropriate even after litigation has concluded, courts should incorporate into sealing orders a sunset provision requiring the party or parties seeking the sealing to appear after some period of time—perhaps three years or five, depending on the circumstances—to establish that continuing the seal is appropriate. In short, every order sealing records should explicitly limit its own duration or, alternatively, require the party seeking protection to reappear and reestablish the necessity of the seal. This simple mechanism will ensure that materials requiring protection from the public's rights of access are maintained under seal—but only as long as necessary, and no longer.

3. Finally, except where otherwise required by law, every decision to place materials under seal should be reflected in the public record, typi-

49. *See* Economic Espionage Act of 1996, 18 U.S.C. § 1839(3) (2000).

cally in two orders. First, an order should issue advising the public of the nature of the documents or records sought to be sealed, and setting a hearing date so members of the public may appear to object to the sealing.[50] Second, if the hearing results in the sealing of any materials, the court should issue a public order disclosing the fact that materials were sealed, describing the nature of the sealed materials to the greatest extent possible without compromising the seal and explaining the reasons justifying sealing—again to the extent possible without compromising the seal. Issuing such an order serves important purposes. First, it requires that the courts pay close attention to the merits of the sealing motion, rather than simply accept a party's representations about the need for protection. This ensures that only meritorious motions to seal are granted. Further, such an order creates a public record that can immediately be scrutinized and challenged by those who might have an interest in public access to the sealed material.

Much has been said about sealing, and much remains to be said.[51] The modest suggestions—no complete sealing of cases, no permanent sealing of materials and issuance of public sealing orders that describe both the sealed material and the reasons for sealing—are intended to reflect and embody the fundamental principles of transparency and accountability outlined at the beginning of this Article. An empirical study of existing sealing practices across the ninety-three districts would likely be beneficial by revealing whether and to what degree court seals are used in a manner contrary to the principles of judicial transparency discussed in this Article. But with or without such a study, concern for judicial transparency and independence counsels caution whenever a seal request is made.

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50. *See In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984).

51. *See, e.g.*, Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791 (2004); Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439 (2006); Daniel Lombard, Note, *Top Secret: A Constitutional Look at the Procedural Problems Inherent in Sealing Civil Court Documents*, 55 DEPAUL L. REV. 1067 (2006).