REPORT TO THE MARYLAND AD HOC COMMITTEE ON ELECTRONIC ACCESS TO COURT RECORDS

CONSTITUTIONAL AND COMMON LAW RIGHTS OF ACCESS TO COURT RECORDS

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INTRODUCTION

The Committee on Electronic Access to Court Records must parce out what constitutional, common, statutory and regulatory law applies to release of court records and what administrative and business practices currently operate. This memorandum, briefly and without encyclopedic citations, will lay out the constitutional and common law background. It concludes, without question, the constitutional foundation is an 800-pound gorilla; it controls the question of whether the courts, the legislature or executive agencies have the power needed to impose any limits on access, and if so, under what circumstances.

I. The Constitution of the United States Requires a Presumption that Court Proceedings Will be Open to the Public.

A quartet of U.S. Supreme Court cases, relying on previous case law, on Anglo-American history, and on American traditions, held that the public and the press have a First Amendment right to attend and report on all parts of criminal proceedings. Before that right can be limited, the Court found that a trial judge must hold a hearing in advance to

establish that conditions exist that justify prior restraint or any closure of the proceedings, determine that no other remedy will work and that the prior restraint or closure will be effective. The standard for closure is high and rarely met. Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980) (holding that the public has a First Amendment right of access to a criminal trial); Globe Newspaper v. Superior Court, 457 U.S. 596 (1982) (holding that blanket closures cannot be mandated by law, but must be determined by the trial court on a case by case basis; Press Enterprise v. Superior Court, 464 U.S. 501 (1985) (holding that the court could not seal the transcript of the jury's voir dire without following the correct procedure); Press Enterprise v. Superior Court, 478 U.S. 1 (1986)(holding that the First Amendment right of access to criminal trials extends to preliminary or pretrial hearings).

Without the presumption of open courts, its several purposes would falter and our court system would be fundamentally different. In performing the essential functions of our court systems, participants must be aware of an unbroken public gaze, the possibility of challenge, the demand for accuracy and truthfulness. “These policies relate to the public's right to monitor the functioning of our

courts, thereby insuring quality, honesty and respect for our legal system." In Re Continental Securities 732 F.2d 1302 1309 (7th Cir. 1984). "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience." Globe Newspapers, *supra*, 457 U.S. at 605-606. In a word, closure is *inconsistent* with the law and the traditions that have created American court systems.

II. Maryland Has Identified Open Court Proceedings as Required under Federal and State Constitutional Provisions.

Maryland courts of appeal have had a number of occasions to apply this black letter law, and did so relying on Article 40 of the Maryland Constitution as well as the First Amendment to the U.S. Constitution. Maryland v. Cottman Transmissions

Systems, Inc., 75 Md. App. 647, 656, 542 A.2d 859, 863 (1988); *see* Buzbee v. Journal Newspapers, Inc., 297 Md. 68, 76, 465 A.2d 426, 431 (1983) ("there is a right of public access to pretrial hearings in criminal cases and that right is predicated on the First and Fourteenth Amendments and on Article 40 of the Maryland Declaration of Rights"); Hearst Corporation v. Maryland, 60 Md.App. 651, 484 A.2d 292 (Md. App. 1984). This constitutional right of access applies to both civil and criminal proceedings, *See* Doe v. Shady Grove Adventist Hospital, 89 Md. App. 351, 359, 598 A.2d 507, 511 (1991) (civil proceedings); Patuxent Publ'g Corp. v. Maryland, 48 Md. App. 689, 692, 429 A.2d 554, 556 (1981) (criminal proceedings) and to pre-trial proceedings, such as preliminary hearings and jury selection, as well as to trials. *See* Press-Enterprise Co. v. Superior Court, *supra*,(preliminary hearing); Press-Enterprise Co. v. Superior Court, *supra*,(*voir dire* proceedings).

Just as the Supreme Court of the United States has done, Maryland courts recognize the functional role of the presumption of access: "public access plays a 'positive,' indeed critical, role in ensuring the fairness of our judicial system." Baltimore Sun v. Thanos, 92 Md. App. 227, 234, 607 A.2d 565, 568 (1992). As the Court of Special Appeals

explained in Journal Newspapers, Inc. v. Maryland nearly two decades ago:

> What justifies the "constitutionalization," through application of the First Amendment free speech and press clause, of public access to a trial is the legitimate interest that the public has in observing the workings of its judicial and criminal justice systems, to ensure that they are both fair and effective. That same interest exists with respect to pretrial judicial proceedings. If the policeman has misbehaved and as a result has caused valuable evidence to become forfeit[ed], if a request is made to move the trial, or delay it, or to disqualify the judge, or to set or revoke bail — the public has a compelling interest in these things and thus a right to observe the decisional process. *Indeed, in a democratic society, these matters are likely to be of even greater interest than the guilt or innocence of a particular defendant.*

54 Md. App. 98, 109, 456 A.2d 963, 969 (emphasis added), *aff'd sub. nom* Buzbee v. Journal Newspapers, Inc., 297 Md. 68, 465 A.2d 426 (1983) (constitutional right of access applies to pretrial criminal proceedings); *see also* Patuxent Publ'g Corp. v. Maryland, 48 Md. App. 689, 692, 429 A.2d 554, 556 (1981) (same). The importance of this functional or structural role of the presumption of open courts cannot be understated. Our democracy lies on ". . . the antecedent assumption that valuable public debate -- as well as other civic behavior -- *must be informed*. (Footnote omitted.)" Richmond Newspapers, *supra*, 488 U.S. 587.

III. The Same Constitutional Right of Access Extends to Federal and State, Civil and

Criminal Court Records.

A. Maryland Criminal Records Access: In Maryland, only the Court of Special Appeals has taken the opportunity to recognize that the rights of access to judicial proceedings encompasses a right to attend court proceedings themselves, but also to *see and copy records* relating to public judicial proceedings. Although the Maryland Court of Appeals has not ruled on the question whether there is a constitutional right of access to court records, *see*, <u>Baltimore Sun Co. v. Mayor & City Council of Baltimore</u>, 359 Md. 653, 659, 755 A.2d 1130, 1134 (2000) (declining to decide constitutional issue in light of common law right of access to court proceedings and court records), the Maryland Court of Special Appeals has held that such a right exists in both criminal and civil cases. In <u>Thanos</u>, *supra*, a newspaper was seeking access to a pre-sentence investigation report admitted into evidence under seal in a criminal case. 92 Md. App. at 231, 607 A.2d at 567. After noting that "[a] number of courts have . . . expressly recognized a First Amendment right of access to certain judicial records in criminal cases," the Court of Special Appeals held that the trial court could not deny access to the pre-sentence report without first considering whether a compelling interest in the report's confidentiality outweighed

the constitutional right of access to court records in criminal cases, and without considering alternatives to a broad seal. *Id.* at 233, 607 A.2d at 568.

B. Maryland Civil Court Records: In Doe v. Shady Grove Adventist Hospital, 89 Md. App. 351, 360, 598 A.2d 507, 511 (1991), the Court of Special Appeals found that the constitutional right of access to court records guaranteed by both the First Amendment to the United States Constitution and Article 40 of the Maryland Declaration of Rights applies in civil as well as criminal proceedings. In that civil proceeding, the court allowed the plaintiff to proceed anonymously (as John Doe) while making clear that the court records in that case should not be sealed so as not to "intrude at all on the public's right of access to court records." *Id.* at 365, 598 A.2d at 514.

C. Federal Court Records: Federal courts, including the United States Court of Appeals for the Fourth Circuit (which includes the District of Maryland), have also confirmed that there is a constitutional right of access to court records in both criminal and civil proceedings. *See* In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986) (First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases); Rushford

v. The New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (First Amendment right of access applies to documents filed in connection with a summary judgment motion in a civil case); Associated Press v. United States Dist. Court for the Cent. Dist. of Calif., 705 F.2d 1143, 1145 (9th Cir. 1983) ("the public and press have a [F]irst [A]mendment right of access to pretrial documents in general"); In re Continental Illinois Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) ("The public's right of access to judicial records has been characterized as 'fundamental to a democratic state.'. . . Recently, we recognized that this presumption is of constitutional magnitude.")(citations omitted). United States v. Mitchell, 179 U.S. App. D.C. 293, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), *quoted in* United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982) ("The public's right of access to judicial records has been characterized as "fundamental to a democratic state[.])

D. Closure of Court Records

Trial judges may close records in individual cases, when constitutional guidelines are followed carefully. Access may be "abrogated only in unusual circumstances." Stone v.

University of Md. Med. Sys. Corp., 855 F.2d 178, 182 (4th Cir. 1988) (vacating and remanding order to seal entire case record where lower court did not provide notice, reasons for sealing, or opportunity for objection). A trial judge is required to find that the reasons for closure outweigh the reasons for access, that closure will address the problems raised by access, that closure is as narrow as possible and lasts for as short a time as possible. Thanos, *supra*, 92 Md. App. at 246-47, 607 A.2d at 574 (vacating and remanding order sealing pre-sentence investigation report). *And see, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 15 (1986).

IV. The Right of Access to Court Records Also Rises from Maryland Common Law.

Those courts that have not had occasion to address the constitutional right of access to court records, including the Maryland Court of Appeals, have recognized a public right of access to inspect and copy judicial records arising from a longstanding tradition of open records at common law:

> Throughout our history, the open courtroom has been a fundamental feature of the American judicial system. Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision.

Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983); *see also* Nixon v. Warner Communications Inc., 435 U.S. 589, 597 (1978). The Court of Appeals has traced the tradition of open courts, termed the "legacy of open justice," from its English roots to colonial America where it "became an intrinsic element of early colonial governments." Baltimore Sun Co. v. Mayor & City Council of Baltimore, 359 Md. 653, 662, 755 A.2d 1130, 1135 (2000) (quoting Richmond Newspapers, 448 U.S. at 590).

The Court of Appeals has recently confirmed that in Maryland, the common law does provide a public right of access to court records as well as to the underlying judicial proceedings: "The common law principle of openness is not limited to the trial itself but applies generally to court proceedings *and documents*." Baltimore Sun Co. v. Mayor & City Council of Baltimore, 359 Md. at 661, 755 A.2d at 1134 (emphasis added); *see* Baltimore Sun Co. v. Colbert, 323 Md. 290, 305, 593 A.2d 224, 231 (1991) ("there is a common law right to inspect and copy judicial records and documents"); Thanos, 92 Md. App. at 233, 607 A.2d at 567. The Court of Special Appeals has explained that "[t]he purpose behind the right of the public and media to attend trials and inspect court records is obvious. It is through the exercise of such

a right that the public knows what transpires in its courts." Hearst Corp., 60 Md. App. at 658, 484 A.2d at 295.

The common law right of access to court records may be overcome by a showing that an important competing interest outweighs the public interest in access. See Stone, 855 F.2d at 180; Rushford, 846 F.2d at 253. It is true that common law principles may also be modified by statute, court rule or order, unlike constitutional law. *See* Baltimore Sun Co. v. Mayor & City Council of Baltimore, 359 Md. at 662, 755 A.2d at 1135. But in Maryland, the General Assembly has actually confirmed and expanded, through statute, the general right of public access to court records. Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. §§ 2-203 (2001) §§ 2-203. Inspection of records:

> Unless otherwise provided by law or order of court, any person may, without charge, inspect, examine, and make memoranda or notes from an index or paper filed with the clerk of a court.

Maryland Rule 16-308 applies to Circuit Courts:

> c. Inspection of criminal history record information contained in court records of public judicial proceedings. Unless expunged, sealed, marked confidential or otherwise prohibited by statute, court rule or order, criminal history record information contained in court records of public judicial proceedings is subject to inspection by any person at the times and under conditions as the clerk of a court reasonably determines necessary for the protection of the records and the prevention of

> unnecessary interference with the regular discharge of the duties of his office.

Maryland Rule 16-503 applies the same rule to District Courts.

V. As the Right of Access to Records Applies to Individual Cases, It Also Applies to Collections of Information.

Because the public is to know "what transpires in its courts," *supra*, the public is allowed access to individual trials and their records. It is impossible to comprehend the broad operational success of any government process without knowing how the process impacts the individual. And on the flip side the constitutional right of access to court records has been held to extend not just to court records filed in a particular case, but also to compilations of data drawn from the records of numerous cases. Specifically, in Globe Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993), the court held that the First Amendment right of access to court records encompassed alphabetized indices to closed criminal cases. In that case, the state court records custodians had declined to allow unrestricted public access to such indices on the basis of a generalized concern for the privacy interests of defendants. *See id.* at 93. The federal court analogized the indices to a "card catalogue" for the "vast library of volumes" of courthouse papers. *Id.* at 94. The federal court held that the ban on access to the indices

“impose[d] a substantial burden on the ability of the press to provide fully developed criticism of the institutions which administer criminal justice through the Massachusetts state courts,” and thus violated the First Amendment. *Id.* at 96.

VI. In Matters Concerning Access to Court Records, Judges Have the Power To Exercise Discretion; Agencies and Administrators Do Not.

The Court of Appeals has adopted rules that protect confidentiality in limited instances supported by historical practice. Nonetheless, no record is absolutely closed. In every instance, the court retains the power to open the confidential records when circumstances warrant disclosure: **criminal investigations**, Md. Rule 4-642 (“Files and records of the court pertaining to criminal investigations shall be sealed and shall be open to inspection only by order of the court.”), **attorney disciplinary hearings**, Md. Rules 16-704 & 16-718, (“Files and records of a court pertaining to any motion filed with respect to a subpoena shall be sealed and shall be open to inspection only by order of the court.”) **adoption and guardianship**, Md. Rule 9-112, (“These dockets are not open to inspection by any person, including the parents, except upon order of court. If the index to a docket is kept apart from the docket itself, the index is open to inspection.”) and **juvenile proceedings**, Md. Rule 11-121,

(Files and records of the court in juvenile proceedings, including the docket entries and indices, are confidential and shall not be open to inspection except by order of the court or as otherwise expressly provided by law.") It is interesting to notice, however, that the General Assembly has changed its *in loco parentis* approach to juveniles recently and now permits access to juvenile proceedings. Maryland Juvenile Causes Rule 3-812 *et seq.*

While legislatures can follow common law traditions in closing particular categories of court records, legislatures may not give administrative offices the power to exercise discretion. Neither law nor regulation may empower administrative employees to grant access to some segments of the public and not to others. Courts have repeatedly held that, even in circumstances where a particular form of access to governmental proceedings or records is not guaranteed under the First Amendment, it nonetheless violates the First Amendment for the government to pick and choose who may enjoy such access unless such discrimination is necessary to advance a compelling governmental interest. *See* Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) (although press had no First Amendment right of access to discovery materials protected by a protective order, First Amendment prohibited court from

“selectively excluding” newspaper from access after material at issue was made available to health officials and one television station); Sherrill v. Knight, 569 F.2d 124, 129 (D.C. Cir. 1977) (although there is no First Amendment right of access to the White House, grant of access to some members of press requires that access not be denied to other members of the press “arbitrarily or for less than compelling reasons”); American Broadcasting Cos. v. Cuomo, 570 F.2d 1080, 1087 (2d Cir. 1977) (although there was no right of press to attend political candidate’s post-election party, “once there is . . . [access] by some of the media, the First Amendment requires equal access to all of the media”).

Other courts have held that discrimination in the provision of access to government records violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See* McCoy v. Providence Journal Co., 190 F.2d 760, 765 (1st Cir. 1951) (city official’s withholding of access to tax records from one party while granting it to that party’s competitor “constitutes a denial of equal protection of the laws”); Donrey Media Group v. Ikeda, 959 F. Supp. 1280, 1286 (D. Haw. 1996) (access to government records cannot be selectively administered consistent with equal protection); Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp.

8, 16 (S.D. Iowa 1971) (denial of underground newspaper's request for access to police department records made available to other requestors violated First Amendment and Equal Protection Clause of the Fourteenth Amendment, regardless of "[w]hether this access is denominated a 'right' or a 'privilege'").

Similarly, even if there were not an independent constitutional right of access to court records, First Amendment principles would nonetheless independently prohibit courts from setting up any system for access to court records that vests court officials with broad and subjective discretion to decide whether to grant a request for access or whether one requestor or type of requestor should be favored over others. The Supreme Court has squarely held that the First Amendment bars any regulatory scheme that vests government officials with wide-ranging discretion to decide who may engage in "expression or conduct associated with expression," even if the First Amendment would not independently guarantee any right to engage in the conduct at issue. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 760 (1988) (striking down regulation granting mayor unbridled discretion to grant or deny licenses to place newspaper dispensing machines on city sidewalks, even though

the court assumed it may have been permissible for the city to impose a total ban on such machines).

"Unfettered discretion" is not permitted and "neutral criteria" are essential to insure that governmental decisions relating to conduct associated with expression are "not based on the content or viewpoint of the speech" in which the person applying for permission wishes to engage. Plain Dealer, 486 U.S. at 760-61. Absent "neutral criteria," there is a "danger of censorship," which is anathema to the First Amendment. *Id.* Obtaining access to court records clearly is "conduct commonly associated with expression," *id.* at 759, in the sense that it is a basic prerequisite for enabling the press and the public to report about, discuss, and criticize the activities of the judiciary. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc. 468 U.S. 641, 648-9 (1984).

VII. DOJ v. Reporters' Committee Does Not Provide Authority for Limiting Access to Court Records.

Those who voice support for implementing across-the-board restrictions on access to electronic court records rely on United States Department of Justice v. Reporters Committee for

Freedom of the Press, 489 U.S. 749 (1989). The case interprets the federal Freedom of Information Act ("FOIA"). 5 U.S.C. 552 *et seq*. It should be apparent from this fact and from the foregoing law, the Reporters' Committee case provides no legal authority that would permit or justify a fundamental change the presumption in favor of access to court records.

The Reporters' Committee had joined CBS News in seeking the matters of public record contained in the so-called "rap sheet" for an organized crime figure identified by the Pennsylvania Crime Commission. "Rap sheets" are compiled by the Justice Department from local, state and federal agencies to reflect identification of an individual and his/her criminal history. The creation of such records, authorized in 1924, tacitly acknowledged that criminal investigations frequently cross state lines and detection is aided immensely by access to a central repository of information. Generally, but not consistently, the records have been treated as confidential. Department of Justice v. Reporters' Committee, 489 U.S. 749 (1989).

The CBS/Reporters' Committee request for the records were made under the federal FOIA and the access question was considered under Exemptions 6 and 7(C). 5 U.S.C. §552(b).

Exemption 6 protects personnel, medical and "similar" files where disclosure would "constitute a clearly unwarranted invasion of personal privacy." §552(b)(6). Similarly, Exemption 7(C) protects records of law enforcement agencies if disclosure would become "an unwarranted invasion of personal privacy." §552(b)(7)(C).

As a first point of distinction, the records are compiled by agencies, not courts, and though some of the information may also be contained in court records, the purpose of the agency record is to aid in law enforcement, not in the operation of the courts.

Second, the concern underlying the Reporters' Committee decision was that the data itself was a compilation of information about a person that was gathered from disparate sources. When these records were assembled in a central location presented a cumulative personal portrait that might amount to an "unwarranted" invasion of privacy. Reporters' Committee, 489 U.S. at 764. Or, as Judge Kenneth Starr put it at the court of appeals level, "computerized data banks of the sort involved here present issues considerably more difficult than, and *certainly very different from, a case involving the source records themselves*." *Id.* at 760, quoting 831 F.2d at

1128 (Starr, dissenting). (Emphasis supplied.) Repeatedly, the Supreme Court emphasized the "difference between scattered bits of criminal history and a federal compilation." *Id.* at 767.

In considering the question of enhanced access to court records of criminal dispositions, there is no "computerized summary" of judicial and non-judicial records no "compilation" of "scattered bits" of information about an individual that might in assembled form implicate some interest in personal privacy. Here the public would simply have electronic access to "the source records themselves," the same court files that are accessible today at the courthouse, or on-line through the Maryland Administration of Courts Judicial Information System. Electronic access does enhance inspection of public records, but making public records easier to reach does not create an invasion of privacy. *See, e.g.* "There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record " Restatement of Torts 2d, §§ 652D. ". . . even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the

public record. Cox v. Cohn 420 U.S. 469, 494-495 (1975) (where the record revealed the name of a rape victim.) And in fact, even when the very records addressed in Reporters' Committee were released to the public, the subject of the records had no cause of action for invasion of privacy.

> [S]everal curious officers accessed the National Crime Information Center ("NCIC") and the Arkansas Crime Information Center ("ACIC") computer systems in an effort to confirm rumors that Eagle [the subject] had a felony record. . . . [Nonetheless] the situation in [this]case . . . seems more analogous to circumstances in which courts have refused to recognize a legitimate expectation of privacy. See Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995)("Criminal activity is . . . not protected by the right to privacy."); Holman v. Central Arkansas Broadcasting Co., 610 F.2d 542, 544 (8th Cir. 1979)("No right to privacy is invaded when state officials allow or facilitate publication of an official act such as an arrest."); Baker v. Howard, 419 F.2d 376, 377 (9th Cir. 1969)(holding that constitutional right is not implicated even when police officers circulate false rumors that person has committed a crime). . . . Far from being "inherently private," the details of Eagle's prior guilty plea are by their very nature matters within the public domain. Accordingly, we decide without hesitation that Eagle has no legitimate expectation of privacy in this material.

Eagle v. Morgan, 88 F.2d 620, 626 (8th Cir. 1996).

Third, there is an important practical difference between the issue of electronic access to court files and the issue of access to FBI "rap sheets" under FOIA that was presented in the Reporters' Committee case. Requiring DOJ, or any law

enforcement agency to produce rap sheets in response to any person's FOIA request for anyone else's rap sheet, a prospect that would invite routine requests from employers and others, place an unimaginable burden on the agency, and result in the wholesale dissemination of FBI records that have not been traditionally available to the public. Allowing electronic access to public court files would place a burden on no one, because access would be simple and automatic; and it would result in the dissemination of no information that is not already available to the public.

Finally, because Reporters' Committee involved executive branch records sought under FOIA, the sole issue before the Court was whether the disclosure of FBI rap sheets to third parties "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 7(C). *Id.* at 751. None of the First Amendment or common law rights that attach to court records were implicated by the FOIA request for FBI rap sheets. Instead, the Court was deciding purely "what the framers of the FOIA had in mind" when they created the statutory exemption at issue. Id. at 765. The Supreme Court's balancing analysis to determine whether disclosure of FBI rap sheets could result in an "unwarranted invasion of personal

privacy" was purely a matter of statutory interpretation. It should be clear that had court records been at issue, the Court would have had to address a different and, as above, much more demanding test.

CONCLUSION

The demanding nature of the standard for sealing court records is grounded in our long-standing commitment to open courts and open court records. Because of this commitment, the first question asked to determine whether a record should be public is the source of the record, not its contents. Especially when records are produced by the criminal courts, they carry a heavy presumption of openness and open access, difficult to overcome and possible to overcome only under judicial review of the individual case. The records treated in Reporters' Committee are not part of that tradition, (the Court specifically noted that "most States deny the general public access to their criminal-history summaries" and that it was "reasonable to presume that Congress legislated with an understanding of this professional point of view.") Id. at 767. Thus, the holdings do not apply to a decision to enhance access to criminal court records.

Respectfully submitted,

Alice Neff Lucan, Esq.
Ad Hoc Committee on Access to Court Records

N.B. To accomplish the drafting of this memorandum and to avoid needless duplication of work, I have, in some parts, copied and paraphrased from the legal discussion in the written testimony submitted by the Washington Post and others to the original Court Records Access Committee.