The Burger Court Opinion Writing Database

Richmond Newspapers, Inc. v. Virginia

448 U.S. 555 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 27, 1980

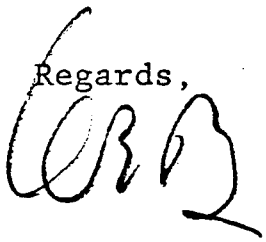
Re: 79-243 - Richmond Newspapers, Inc. v. Virginia

MEMORANDUM TO THE CONFERENCE:

Enclosed is a Wang draft of the opinion in this case, as delivered to the Printer.

I have refrained from relying on the Ninth Amendment but the discussion of its genesis gives at least "lateral support" to the central theme. The Jefferson-Madison correspondence and other records seem to make this worthwhile in terms of pointing out Madison's rationale.

Regards,



To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

MAY 2[illegible] 1980

Circulated: _____

Recirculated: _____

No. 79-243

Richmond Newspapers, Inc., et al. v. Virginia, et al

Mr. Chief Justice Burger delivered the opinion of the Court.

The question presented in this case is whether the right to attend criminal trials is guaranteed under the United States Constitution.

I

In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Virginia. The Virginia Supreme Court reversed the conviction in October 1977, holding that a bloodstained shirt purportedly belonging to Stevenson had been improperly admitted into evidence. Stevenson v. Commonwealth, 218 Va. 462, 237 S.E. 2d 779 (1977).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1980

RE: 79-243 - Richmond Newspapers, Inc.
v. Virginia

MEMORANDUM TO THE CONFERENCE

Early next week I will have some revisions in Part III of the above.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1980

RE: 79-243 - Richmond Newspapers, Inc.
v. Virginia

MEMORANDUM TO THE CONFERENCE

First Print Draft in the above is enclosed. Revisions reflect in part reaction to the typed draft and in part the normal evolution. The "assembly" aspect is segregated for those who think it irrelevant.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 11 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, v. Commonwealth of Virginia et al. } On Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether the right to attend criminal trials is guaranteed under the United States Constitution.

I

In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Va. The Virginia Supreme Court reversed the conviction in October 1977, holding that a bloodstained shirt purportedly belonging to Stevenson had been improperly admitted into evidence. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S. E. 2d 779 (1977).

Stevenson was retried in the same court. This second trial ended in a mistrial on May 30, 1978 when a juror asked to be excused after trial had begun and no alternate was available.[1]

[1] A newspaper account published the next day reported the mistrial and went on to note that "[a] key piece of evidence in Stevenson's original conviction was a bloodstained shirt obtained from Stevenson's wife soon after the killing. The Virginia Supreme Court, however, ruled that the shirt was entered into evidence improperly." App., at 34a.

HHB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Harry I should have "copied" you on this - just to keep you posted. WEB

June 19, 1980

RE: 79-243 - Richmond Newspapers v. Virginia

Dear John:

I have no difficulty with recasting the opening paragraph of Part II, page 6. I have adapted your suggestions as follows:

"We begin consideration of this case by noting that the precise issue presented here has not previously been before this Court for decision. In Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979), the Court was not required to decide whether a right of access to trials, as distinguished from hearings on pretrial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a pretrial suppression hearing. One concurring opinion specifically emphasized that 'a hearing on a motion before trial to suppress evidence is not a trial....' 443 U.S., at 394 (Burger, C.J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials, id., at 392 and n. 24; nor did the dissenting opinion reach this issue. Id., at 447 (Blackmun, J., dissenting)."

Since this represents no change I will not circulate this to others at this time. When Harry comes to rest I will memo the Conference. Anyone who joins my current draft will surely join with this change.

Regards,

WEB

Mr. Justice Stevens

cc: Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1980

Re: No. 79-243 Richmond Newspapers v. Virginia

Memorandum to the Conference:

I have today sent to the Printer the following changes in my June 11 draft:

The question presented on page one should read:

> "The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution."

The first full paragraph on page six should read:

> "Since the Virginia Supreme Court declined plenary review, it is reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record. More often than not, criminal trials will be of sufficiently short duration that a closure order 'will evade review, or at least considered plenary review in this Court.' Nebraska Press, supra, at 547. Accordingly, we turn to the merits."

Also on page six, the first paragraph of Part II should read:

> "We begin consideration of this case by noting that the precise issue presented here has not previously been before this Court for decision. In Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979), the Court was not required to decide whether a right of access to trials, as distinguished from hearings on pretrial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a pretrial suppression hearing. One concurring opinion specifically emphasized that 'a hearing on a motion before trial to suppress evidence is not a trial....' 443 U.S., at 394 (Burger, C.J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials, id., at 392 and n. 24; nor did the dissenting opinion reach this issue. Id., at 447 (Blackmun, J., dissenting)."

On page seven, the first paragraph of Part II A should read:

> "The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. We need not here review all details of its development, but a summary of that history is instructive. What is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe."

On page thirteen, the sentence following the citation to Weihofen should read:

> "Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion."

On page fourteen, the last sentence of the first paragraph should read:

> "To work effectively, it is important that society's criminal process 'satisf[ies] the appearance of justice,' Offutt v. United States, 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it."

On page nineteen, the first sentence of Part III B should read:

> "The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance."

On pages twenty and twenty-one, the text from the sentence beginning "More recently we characterized...." up to the end of Part III B should be deleted, and the following substituted in its place:

> "Subject to the traditional time, place, and manner restrictions, see, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941); see also Cox v. Louisiana, 379 U.S. 559, 560-564 (1965), streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, see Hague v. C.I.O., 307 U.S. 496, 515 (1939) (opinion of Roberts, J.); a trial courtroom also is a public place where the people generally--and representatives of the media--have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.[14]"

And on page twenty-three, the third sentence of Part III D should read:

> "Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial."

I will circulate another printed draft as soon as it is available.

Regards,

P.S. It is most unfortunate that, although seven of us are of one mind on the essentials of this case--the openness of criminal trials--we fail, apparently, to clarify the confusion that followed in the wake of Gannett. We are under the same "Term end" pressures that accompanied Gannett, but I think we fall short if the present lack of a "Court" prevails. I have yet to see a writing, other than Bill Rehnquist's, which is so at odds with the the assigned opinion that the author of that separate writing could not also join the assigned opinion. If significant differences do exist, an attempt should be made to communicate them and to work them out--as some have done. An unnecessarily "fractionated Court" serves no good purpose; it causes those reading our opinions to find differences of substance which are not actually there.

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1980

Re: Cases held for No. 79-243, Richmond Newspapers v. Virginia

MEMORANDUM TO THE CONFERENCE:

The two cases held for Richmond Newspapers--No. 79-489, Merola v. Bell, and No. 79-561, New York News v. Bell--both involve closure of the same pretrial suppression hearing.

A 13-year-old was charged with murder in Bronx County, New York, under a 1978 state law allowing certain young offenders to be charged as adults. When the defendant moved to suppress certain statements made to police, he also moved to close the hearing on the ground that the media might bring this proffered evidence to the attention of prospective jurors. The prosecution opposed the motion, and the trial judge invited and heard argument by representatives of the media. The judge then closed the hearing to the press but made provision for the press to receive daily redacted transcripts. The proceedings in the criminal case were stayed pending review of the order; both petitioner Merola, the District Attorney of Bronx County, and petitioner New York News sought review of the closure order.

The Appellate Division of the New York Supreme Court denied both applications, relying on the New York Court of Appeals decision in Gannett Co. v. DePasquale, 43 N.Y.2d 370 (1977). The Court of Appeals affirmed on July 9, 1979, noting that "[i]n this case it appears without doubt that there was a fulfillment of the requirements laid down in Matter of Gannett Co. v. DePasqulae," which this Court had affirmed on July 2, 1979. See Pet. in No. 79-489 at 2a. On August 10, 1979, the defendant entered a plea of guilty to felony murder, and his case was removed from the Supreme Court, Bronx County, to the Family Court for disposition.

Petitioners argue that we should take this case after our ruling in Gannett to decide whether and under what circumstances the First and Fourteenth Amendments guarantee access to pretrial proceedings, inasmuch as Gannett decided only the Sixth Amendment access issue with regard to pretrial hearings. On balance, I am inclined to deny. The holding in Richmond Newspapers concerns First Amendment access to trials, not pretrial hearings, so a GVR would be of somewhat doubtful

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 26 1980

CHANGES AS MARKED:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, v. Commonwealth of Virginia et al. } On Appeal from the Supreme Court of Virginia,

[June —, 1980]

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion in which Mr. Justice White and Mr. Justice Stevens joined.

The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.

I

In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Va. The Virginia Supreme Court reversed the conviction in October 1977, holding that a bloodstained shirt purportedly belonging to Stevenson had been improperly admitted into evidence. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S. E. 2d 779 (1977).

Stevenson was retried in the same court. This second trial ended in a mistrial on May 30, 1978 when a juror asked to be excused after trial had begun and no alternate was available.[1]

[1] A newspaper account published the next day reported the mistrial and went on to note that "[a] key piece of evidence in Stevenson's original conviction was a bloodstained shirt obtained from Stevenson's wife soon after the killing. The Virginia Supreme Court, however, ruled that the shirt was entered into evidence improperly." App., at 34a.

1st DRAFT

From: Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

Circulated: MAY 28 1980

Recirculated: _____

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, v. Commonwealth of Virginia et al. | On Appeal from the Supreme Court of Virginia.

[May —, 1980]

MR. JUSTICE BRENNAN, concurring in the judgment.

Gannett Co. v. *DePasquale*, 443 U. S. 368 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access, I agree with the Court that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.[1]

[1] Of course, the Sixth Amendment remains the source of the *accused*'s own right to insist upon public judicial proceedings. *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979).

That the Sixth Amendment explicitly establishes a public trial right does not impliedly foreclose the derivation of such a right from other provisions of the Constitution. The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives. Significantly, this Court has recognized the open trial right both as a matter of the Sixth Amendment and as an ingredient in Fifth Amendment due process. See *Levine* v. *United States*, 362 U. S. 610, 614, 616 (1960); cf. *In re Oliver*, 333 U. S. 257 (1948) (Fourteenth Amendment due process).

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens,

From: Mr. Justice Brennan

Circulated: _____

Recirculated: JUN 2 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, *v.* Commonwealth of Virginia et al. } On Appeal from the Supreme Court of Virginia.

[May —, 1980]

MR. JUSTICE BRENNAN, concurring in the judgment.

Gannett Co. v. *DePasquale,* 443 U. S. 368 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access, I agree with the Court that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.[1]

[1] Of course, the Sixth Amendment remains the source of the *accused's* own right to insist upon public judicial proceedings. *Gannett Co.* v. *DePasquale.* 443 U. S. 368 (1979).

That the Sixth Amendment explicitly establishes a public trial right does not impliedly foreclose the derivation of such a right from other provisions of the Constitution. The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives. Significantly, this Court has recognized the open trial right both as a matter of the Sixth Amendment and as an ingredient in Fifth Amendment due process. See *Levine* v. *United States,* 362 U. S. 610, 614, 616 (1960); cf. *In re Oliver,* 333 U. S. 257 (1948) (Fourteenth Amendment due process).

new note 3

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: JUN 6 19

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, *v.* Commonwealth of Virginia et al. | On Appeal from the Supreme Court of Virginia.

[May —, 1980]

MR. JUSTICE BRENNAN, concurring in the judgment.

Gannett Co. v. *DePasquale*, 443 U. S. 368 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access, I agree with the Court that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.[1]

[1] Of course, the Sixth Amendment remains the source of the *accused's* own right to insist upon public judicial proceedings. *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979).

That the Sixth Amendment explicitly establishes a public trial right does not impliedly foreclose the derivation of such a right from other provisions of the Constitution. The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives. Significantly, this Court has recognized the open trial right both as a matter of the Sixth Amendment and as an ingredient in Fifth Amendment due process. See *Levine* v. *United States*, 362 U. S. 610, 614, 616 (1960); cf. *In re Oliver*, 333 U. S. 257 (1948) (Fourteenth Amendment due process).

stylistic changes

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

4th DRAFT

Recirculated JUN 27 1980

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, v. Commonwealth of Virginia et al. } On Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

Gannett Co. v. *DePasquale*, 443 U. S. 368 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access, I agree with ~~the plurality~~ those of my Brethren who hold that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.[1]

[1] Of course, the Sixth Amendment remains the source of the *accused's* own right to insist upon public judicial proceedings. *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979).

That the Sixth Amendment explicitly establishes a public trial right does not impliedly foreclose the derivation of such a right from other provisions of the Constitution. The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives. Significantly, this Court has recognized the open trial right both as a matter of the Sixth Amendment and as an ingredient in Fifth Amendment due process. See *Levine* v. *United States*, 362 U. S. 610, 614, 616 (1960); cf. *In re Oliver*, 333 U. S. 257 (1948) (Fourteenth Amendment due process).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 16, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-243, Richmond Newspapers v. Virginia

If it turns out that there is no possibility of a Court opinion in this case, I shall change the last paragraph so as to join only the judgment.

P.S.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 16 JUN 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, *v.* Commonwealth of Virginia et al. | On Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. JUSTICE STEWART, concurring.

In *Gannett Co.* v. *DePasquale,* 443 U. S. 368, the Court held that the Sixth Amendment, which guarantees "the accused" the right to a public trial, does not confer upon representatives of the press or members of the general public any right of access to a trial.[1] But the Court explicitly left open the question whether such a right of access may be guaranteed by other provisions of the Constitution, *id.,* at 391–393. MR. JUSTICE POWELL expressed the view that the First and Fourteenth Amendments do extend at least a limited right of access even to pretrial suppression hearings in criminal cases, *id.,* at 397–403 (concurring opinion). MR. JUSTICE REHNQUIST expressed a contrary view, *id.,* at 403–406 (concurring opinion). The remaining members of the Court were silent on the question.

Whatever the ultimate answer to that question may be with respect to pretrial suppression hearings in criminal cases, the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.[2] As has been abundantly demonstrated in Part

[1] The Court also made clear that the Sixth Amendment does not give the accused the right to a *private* trial. 443 U. S., at 382. Compare *Singer* v. *United States,* 380 U. S. 24 (Sixth Amendment right of trial by jury does not include right to be tried without a jury.).

[2] It has long been established that the protections of the First Amendment are guaranteed by the Fourteenth Amendment against invasion by

Mr. Justice [illegible]

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 25 JUN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–243

Richmond Newspapers, Inc., et al., Appellants, *v.* Commonwealth of Virginia et al. } On Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. JUSTICE STEWART, concurring in the judgment.

In *Gannett Co.* v. *DePasquale*, 443 U. S. 368, the Court held that the Sixth Amendment, which guarantees "the accused" the right to a public trial, does not confer upon representatives of the press or members of the general public any right of access to a trial.[1] But the Court explicitly left open the question whether such a right of access may be guaranteed by other provisions of the Constitution, *id.*, at 391–393. MR. JUSTICE POWELL expressed the view that the First and Fourteenth Amendments do extend at least a limited right of access even to pretrial suppression hearings in criminal cases, *id.*, at 397–403 (concurring opinion). MR. JUSTICE REHNQUIST expressed a contrary view, *id.*, at 403–406 (concurring opinion). The remaining members of the Court were silent on the question.

Whatever the ultimate answer to that question may be with respect to pretrial suppression hearings in criminal cases, the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.[2] As has been abundantly demonstrated in Part

[1] The Court also made clear that the Sixth Amendment does not give the accused the right to a *private* trial. 443 U. S., at 382. Compare *Singer* v. *United States*, 380 U. S. 24 (Sixth Amendment right of trial by jury does not include right to be tried without a jury.).

[2] It has long been established that the protections of the First Amendment are guaranteed by the Fourteenth Amendment against invasion by

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 23 JUN 1980

Recirculated: _____

Re: 79-243 - Richmond Newspapers, Inc. v. Virginia

MR. JUSTICE WHITE, concurring.

This case would have been unnecessary had Gannett Co. v. De Pasquale, 443 U.S. 368 (1979), construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus requiring that the First Amendment issue involved here be addressed. On this issue, I concur in the opinion of the Chief Justice.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

1st DRAFT

Circulated: _____

Recirculated: 25 JUN 19

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, *v.* Commonwealth of Virginia et al. } On Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. JUSTICE WHITE, concurring.

This case would have been unnecessary had *Gannett Co.* v. *DePasquale,* 443 U. S. 368 (1979), construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus requiring that the First Amendment issue involved here be addressed. On this issue, I concur in the opinion of THE CHIEF JUSTICE.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 6, 1980

Re: No. 79-243 - Richmond Newspapers, Inc. v. Commonwealth of Virginia

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 24 1980

Recirculated: _____

No. 79-243 - Richmond Newspapers, Inc. v. Virginia

MR. JUSTICE BLACKMUN, concurring in the judgment.

My opinion and vote in partial dissent last Term in Gannett Co. v. DePasquale, 443 U.S. 368, 406 (1979), compels my vote to reverse the judgment of the Supreme Court of Virginia.

I

The Court's opinion and decision in this case are gratifying for me for two reasons:

It is gratifying, first, to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial. Ante, at 7-11, 15-17, and n.9. The partial dissent in Gannett, 443 U.S., at 419-433, took great pains in assembling -- I believe adequately -- the historical material and in stressing its importance to this

1/ See, e. g., Stephenson, Fair Trial-Free Press: Rights Continuing Conflict, 46 Brooklyn L. Rev. 39, 63 (1979) ("intended reach of the majority opinion is unclear" (footnote omitted)); The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 65 (1979) ("widespread uncertainty over what the Court held"); Note, 51 Colo. L. Rev. 425, 432-433 (1980) ("Gannett can be interpreted to sanction the closing of trials"; citing "the uncertainty of the language in Gannett," and its "ambiguous sixth amendment holding"); Note, 11 Tex. Tech. L. Rev. 159, 170-171 (1979) ("perhaps much of the present and imminent confusion lies in the Court's own statement of its holding"); Borow and Kruth, Closed Preliminary Hearings, 55 Calif. State Bar J. 18, 23 (1980) ("Despite the public disclaimers . . . , the majority holding appears to embrace the right of access to trials as well as pretrial hearings"); Goodale, Gannett Means What it Says; But Who Knows What it Says?, Nat'l Law J., Oct. 15, 1979, at 20; See also Keefe, The Boner Called Gannett, 66 A.B.A.J. 227 (1980).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

p. 3

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 27 1980

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, v. Commonwealth of Virginia et al. } On Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. JUSTICE BLACKMUN, concurring in the judgment.

My opinion and vote in partial dissent last Term in *Gannet Co.* v. *DePasquale*, 443 U. S. 368, 406 (1979), compels my vote to reverse the judgment of the Supreme Court of Virginia.

I

The decision in this case is gratifying for me for two reasons:

It is gratifying, first, to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial. *Ante*, at 7–11, 15–17, and n. 9. The partial dissent in *Gannett*, 443 U. S., at 419–433, took great pains in assembling—I believe adequately—the historical material and in stressing its importance to this area of the law. See also MR. JUSTICE BRENNAN's helpful review set forth as Part II of his opinion in the present case. *Ante*, at 5–10. Although the Court in *Gannett* gave a modicum of lip service to legal history, 443 U. S., at 386, n. 15, it denied its obvious application when the defense and the prosecution, with no resistance by the trial judge, agreed that the proceeding should be closed.

The Court's return to history is a welcome change in direction.

It is gratifying, second, to see the Court wash away at least some of the graffiti that marred the prevailing opinions in

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 27, 1980

79-243 Richmond Newspapers v. Virginia

Dear Chief:

On the next draft of your opinion, please show that I took no part in the consideration or decision of this case.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 19 JUN 1980

Recirculated: _____

No. 79-243 Richmond Newspapers, Inc. v. Virginia

MR. JUSTICE REHNQUIST, dissenting.

In the Gilbert & Sullivan operetta Iolanthe, the Lord Chancellor recites:

> "The Law is the true embodiment
> of everything that's excellent,
> It has no kind of fault or flaw,
> And I, my lords, embody the law."

It is difficult not to derive more than a little of this flavor from both the opinion of the Chief Justice and the concurring opinion of Mr. Justice Brennan in this case. The opinion of the Chief Justice states that:

> "[H]ere for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure." Ante, at 7.

The concurring opinion of Mr. Justice Brennan states that

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqu

1st DRAFT (Printed)

Circulated: _____

27 JUN 198

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, *v.* Commonwealth of Virginia et al. } An Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

In the Gilbert & Sullivan operetta *Iolanthe,* the Lord Chancellor recites:

> "The Law is the true embodiment
> of everything that's excellent,
> It has no kind of fault or flaw,
> And I, my lords, embody the law."

It is difficult not to derive more than a little of this flavor from both the opinion of THE CHIEF JUSTICE and the concurring opinion of MR. JUSTICE BRENNAN in this case. The opinion of THE CHIEF JUSTICE states that:

> "[H]ere for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure." *Ante,* at 7.

The concurring opinion of MR. JUSTICE BRENNAN states that

> "[R]ead with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." *Ante,* at 2–3.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqu

Circulated: 30 JUN 198

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, *v.* Commonwealth of Virginia et al. } An Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

In the Gilbert & Sullivan operetta *Iolanthe*, the Lord Chancellor recites:

> "The Law is the true embodiment
> of everything that's excellent,
> It has no kind of fault or flaw,
> And I, my lords, embody the law."

It is difficult not to derive more than a little of this flavor from the various opinions supporting the judgment in this case. The opinion of THE CHIEF JUSTICE states that:

> "[H]ere for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure." *Ante*, at 7.

The opinion of MR. JUSTICE BRENNAN states that;

> "[R]ead with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." *Ante*, at 2–3.

For the reasons stated in my separate concurrence in *Gannett Co., Inc.* v. *DePasquale*, 443 U. S. 368, 403 (1979), I do

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

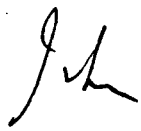
June 9, 1980

MEMORANDUM TO THE CONFERENCE

Re: 79-243 - Richmond Newspapers, Inc.
v. Virginia

Although I may end up joining another opinion after the dust has settled, I thought it best to circulate my present views about this case in the form of the attached concurrence.

Respectfully,



Attachment

1st DRAFT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 9 '80

Recirculated: _____

Richmond Newspapers, Inc. v. Virginia

MR. JUSTICE STEVENS, concurring.

This is a watershed case.[1/] An additional word of emphasis is therefore appropriate.

Twice before the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. In a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in Saxbe v. Washington Post Co., 417 U.S. 843, 850, MR. JUSTICE POWELL unequivocally rejected the conclusion "that any governmental restriction on press access to information, so long as it is not discriminatory, falls outside the purview of First Amendment concern." Id., at 857 (emphasis in original). And in Houchins v. KQED, Inc., 438 U.S. 1, 19-40, I explained at length why MR. JUSTICE BRENNAN, MR. JUSTICE POWELL and I

1/ See Stevens, Some Thoughts about a General Rule, 21 Ariz. L. Rev. 599, 602 (1979): "Whereas the Court has accorded virtually absolute protection to the [dissemination of information or ideas], it has never squarely held that the [acquisition of newsworthy matter] is entitled to any constitutional protection whatsoever."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 17, 1980

Re: 79-243 - Richmond Newspapers v. Virginia

Dear Chief:

Please join me.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Justice Brennan
Justice Stewart
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

2nd DRAFT

6/25/80

SUPREME COURT OF THE UNITED STATES

No. 79-243

Richmond Newspapers, Inc., et al., Appellants, *v.* Commonwealth of Virginia et al. } On Appeal from the Supreme Court of Virginia.

[June —, 1980]

MR. JUSTICE STEVENS, concurring.

This is a watershed case. An additional word of emphasis is therefore appropriate.

Twice before the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. In a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850, MR. JUSTICE POWELL unequivocally rejected the conclusion "that *any* governmental restriction on press access to information, so long as it is not discriminatory, falls outside the purview of First Amendment concern." *Id.*, at 857 (emphasis in original). And in *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 19–40, I explained at length why MR. JUSTICE BRENNAN, MR. JUSTICE POWELL, and I were convinced that "[a]n official prison policy of concealing . . . knowledge from the public by arbitrarily cutting off the flow of information at its source

Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. An additional word of emphasis is therefore appropriate.