ACCESS TO PRESIDENT CLINTON'S VIDEOTAPE TESTIMONY DENIED:
THE EIGHTH CIRCUIT ADDRESSES THE COMMON LAW AND CONSTITUTIONAL RIGHTS OF ACCESS TO JUDICIAL RECORDS IN UNITED STATES v. MCDougAL

INTRODUCTION

The United States Supreme Court has long held that "what transpires in the courtroom is public property."1 There is a common law right to inspect and copy judicial records that supports that proposition.2 The common law right of access to judicial records predates the Constitution, originating in England perhaps as early as 1372.3 It is a right that American courts have come to recognize as consistent with the underlying policies of democracy.4 Audio and video tape trial evidence is the most recent version of a judicial record and the existence of this evidence, combined with the technology of the broadcast media to transmit exact copies of the tapes to widespread audiences, has led to a renewed interest in the common law right.5

In the landmark case of Nixon v. Warner Communications, Inc.,6 the United States Supreme Court acknowledged, for the first time, the common law right of access to judicial records.7 The Supreme Court recognized the common law right as essentially a "presumption however gauged - in favor of public access ...."8 While the Supreme Court recognized a presumption in favor of access, the Court also indicated that the decision regarding access was generally a matter of discretion left to the trial court and, accordingly, that the exercise of such discretion would involve weighing the interests advanced by both parties in light of the public interest and the duty of the courts.9

The common law right of access has come to derive additional support from the constitutional right to attend criminal proceedings.\(^\text{10}\) In *Richmond Newspapers v. Virginia*,\(^\text{11}\) the United States Supreme Court held that the press and public have a constitutional right, protected under the First and Fourteenth Amendments, to attend criminal proceedings.\(^\text{12}\) Over time, courts have recognized the right of access to judicial records as a necessary component of the constitutional right to attend criminal proceedings.\(^\text{13}\)

Recently, in *United States v. McDougal*,\(^\text{14}\) the United States Court of Appeals for the Eighth Circuit held that members of the press and public were not entitled to access to the videotaped deposition testimony of President Clinton.\(^\text{15}\) The Eighth Circuit found that President Clinton's videotaped testimony was not a judicial record to which the common law right of access attached.\(^\text{16}\) The court further found that even if the videotape were a judicial record, the district court did not violate its discretion in denying access under the common law right.\(^\text{17}\) Furthermore, the Eighth Circuit concluded that the district court's denial of access did not violate the First Amendment because the public and press were given access to the information contained on the videotape when it was played in open court.\(^\text{18}\)

This Note will first review the facts and holding of *United States v. McDougal*.\(^\text{19}\) This Note then will examine prior cases in which the issue of access to judicial records, such as audio and video tapes, was determined.\(^\text{20}\) Finally, this Note will scrutinize the Eighth Circuit's decision in *McDougal* and will criticize the court for 1) holding that President Clinton's videotaped deposition testimony was not a judicial record when the Supreme Court and other circuit courts have held that evidentiary video and audio tapes are judicial records; 2) failing to give the common law presumption in favor of access, as acknowledged by the Supreme Court in *Warner Communications*, appropriate weight; 3) failing to overcome the presumption in favor of access; and

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16. Id. at 658-59 (citations omitted).
17. Id. at 656-58 (citations omitted).
18. Id. at 659.
19. See infra notes 22-87 and accompanying text.
20. See infra notes 88-349 and accompanying text.
4) arguably failing to satisfy its own test in denying access to the videotape under the First Amendment.\textsuperscript{21}

FACTS AND HOLDING

\textit{United States v. McDougal,}\textsuperscript{22} arose out of "dealings in an unsuccessful Arkansas real estate venture" subsequently termed "Whitewater."\textsuperscript{23} President Clinton and Hillary Rodham Clinton were business partners in the Whitewater venture with their "one-time friends," James and Susan McDougal, who were eventually charged with fraud as a result of their involvement in Whitewater.\textsuperscript{24} In an effort to redeem themselves, the McDougals subpoenaed President Clinton to testify at their trial, claiming only he could disprove such accusations.\textsuperscript{25}

On February 5, 1996, prior to the trial in the underlying criminal case, the United States District Court for the Eastern District of Arkansas issued an order at the request of defendants Susan H. McDougal and James B. McDougal directing the clerk of the court to issue a subpoena for President William Jefferson Clinton to testify during their trial.\textsuperscript{26} President Clinton responded by requesting to appear via videotaped deposition at a time and location of his choice, pursuant to Federal Rule of Criminal Procedure 15.\textsuperscript{27} On March 20, 1996, the district court issued an order granting President Clinton's request.\textsuperscript{28} The district court subsequently ordered sua sponte that President Clinton's videotape be sealed.\textsuperscript{29} Following its order, the district court requested that the parties submit briefs regarding the handling and

\begin{itemize}
\item \textsuperscript{21} \textit{See infra} notes 350-472 and accompanying text.
\item \textsuperscript{22} 103 F.3d 651 (8th Cir. 1996), \textit{cert. denied by}, Citizens United v. United States, 118 S.Ct. 49 (1997).
\item \textsuperscript{24} Dan Freedman, Specter Blasts Pace of Whitewater Inquiry, Says Starr too Slow, Owes an Explanation, SAN DIEGO UNION-Tribune, Sept. 27, 1997, at A10, \textit{available in} 1997 WL 14526359.
\item \textsuperscript{27} \textit{McDougal,} 940 F. Supp. at 225. Federal Rule of Criminal Procedure 15(a) provides in pertinent part: Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. \textit{FED. R. CRIM. P. 15.}
\item \textsuperscript{28} McDougal, 940 F. Supp. at 225.
\item \textsuperscript{29} \textit{Id.}
\end{itemize}
release of the videotape after it was played to the jury. The district
court also encouraged representatives of the news media, in their ca-
pacity as amicus curiae, to file briefs.

President Clinton's prepared videotaped deposition was taken on
April 28, 1996, at the White House with District Court Judge George
Howard presiding via satellite from Little Rock, Arkansas. On May
3, 1996, a number of media organizations, Radio-Television News Di-
rectors Association, Cable News Network, Inc., Capital Cities/ Ameri-
can Broadcasting Companies, Inc., Reporters Committee for the
Freedom of the Press, National Broadcasting Company, Inc., and
CBS, Inc. ("Media") filed an amicus brief requesting immediate physi-
cal access to the videotaped deposition or, in the alternative, physical
access to the videotape at the time of its display to the jury. The
Media sought access to the videotape in order to broadcast President
Clinton's testimony to the public. The district court denied the Me-
dia's application for immediate access to the videotape. However,
the district court indicated that it would provide access to transcripts
of President Clinton's testimony. The Media moved for reconsidera-
tion of the district court's decision denying access to the videotape;
again, the district court denied the Media's motion.

Prior to the time the videotape was presented at trial, counsel for
the parties in the underlying criminal case edited President Clinton's
videotaped testimony and the accompanying transcript by deleting
portions containing the "objections and arguments of counsel." On
May 9, 1996, the edited videotape deposition was played to the jury in
open court. At that time, members of the public, including the Me-
dia, had an opportunity to view the edited videotape in the manner it
was shown to the jury in the courtroom. The edited transcript was
entered into evidence and made a part of the record; however, the
videotape was excluded from evidence. Copies of the edited tran-
script were made public.

30. Id.
31. United States v. McDougal, 103 F.3d 651, 653 (8th Cir. 1996), cert. denied by,
32. McDougal, 103 F.3d at 653.
33. Id. at 652-53.
34. McDougal, 940 F. Supp. at 226.
35. Id. at 228.
36. Id.
37. Id. at 225-26.
38. Id. at 226 n.5.
39. McDougal, 103 F.3d at 653.
40. Id.
41. Id.
42. Id.
On May 13, 1996, Citizens United ("Citizens"), "a non-profit organization . . . which [had] played a crucial role in providing the public with information regarding the Whitewater scandal," also filed an application for release of President Clinton's videotaped testimony. The district court denied the application, reasoning that Citizens did not have standing to appear in the action because it was not a party to the action and was not a news media organization.

On May 24, 1996, Dow Jones & Company ("Dow Jones"), publisher of the Wall Street Journal, petitioned the court to intervene in the action. Dow Jones asked for a copy of the unedited transcript as well as access to the unedited videotape containing President Clinton's testimony. Counsel for President Clinton requested a protective order barring access to the original videotape and all edited and unedited copies.

Dow Jones's request for the unedited transcript was granted by the district court, but the court denied access to the videotape. The district court, relying on the Supreme Court's opinion in *Nixon v. Warner Communications, Inc.*, held that the Media's, including Dow Jones', First Amendment right of access to public information was satisfied because the press and members of the public were present when the edited videotape was played in court and a written transcript of the videotape was made available to interested parties. In *Warner Communications*, the Supreme Court had found that the Constitution did not provide the press the right under the First Amendment to copy a tape introduced into evidence as long as the court allowed access to the information contained on the tape by other means.

In the present case, the district court further reasoned that it was not necessary to decide if the common law right of access was applicable to the videotape because even if it were, after weighing all of the relevant factors, the circumstances favored keeping the videotape under seal. The district court noted that "substantial access" to the videotape was provided and previous cases involving videotaped testimony of sitting presidents did not result in release. Furthermore, the court reasoned that there was potential for misuse of the video-
tape and release would be inconsistent with the prohibition on cameras in the courtroom according to Federal Rule of Criminal Procedure 53.54 The Media and Citizens appealed the decision of the district court denying access to President Clinton’s videotaped testimony to the United States Court of Appeals for the Eighth Circuit.55 Only Citizens challenged the standing issue.56

On appeal before the Eighth Circuit, Citizens argued that it had standing to appear in the action because decisions of the United States Supreme Court and the Eighth Circuit had long since established that the press and public have equivalent rights regarding access to judicial proceedings and the acquisition of judicial records.57 The Media and Citizens together argued that the videotape was a judicial record to which rights of access attached despite the fact that it was an electronic recording of a witness’s testimony and was not admitted into evidence.58 The Media and Citizens emphasized that President Clinton “should not be permitted to circumvent the common law and constitutional rights to access by marking only the transcript of the videotaped deposition.”59 The Media and Citizens maintained that the videotape constituted a judicial record, and argued that the district court’s denial of access to the videotape violated their common law and First Amendment rights of access to judicial records because nondisclosure was not essential to preserve a compelling government interest.60 The Media and Citizens further argued that “fear of misuse of the videotape in a political campaign does not constitute a compelling interest . . . [and] that ‘[t]he only government interest associated with the Office of President that might justify sealing a judicial record is national security,’” which clearly, according to the Media and Citizens, was not an issue in the present case.61

The Media and Citizens also challenged the district court’s reliance on Warner Communications, arguing that Warner Communications did not control because in that case the Presidential Recordings Act, which was enacted by Congress during the “Watergate” scandal to provide for public dissemination of historical materials associated

54. McDougal, 103 F.3d at 654. Federal Rule of Criminal Procedure 53 provides: “The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.” FED. R. CRIM. P. 53.
55. McDougal, 103 F.3d at 652, 654.
56. Id. at 652.
57. Brief for Appellant at 11, United States v. McDougal, 103 F.3d 651 (8th Cir. 1996) (No. 96-2671).
58. McDougal, 103 F.3d at 654.
59. Id. at 654-55.
60. Id. at 655.
61. Id.
with the event, preempted the common law right of access and provided an alternative means of access to the disputed audio tapes.\textsuperscript{62} Rather, the Media and Citizens argued that the court should have followed \textit{United States v. Poindexter},\textsuperscript{63} a case in which the press was allowed to view former President Ronald Reagan's videotaped deposition testimony before it was played at trial and received access to the videotape after trial.\textsuperscript{64} The court, in \textit{Poindexter}, concluded that because the public and press were not allowed to attend the taping of President Reagan's testimony due to national security concerns, they were entitled to access to the videotape in order to vindicate their First Amendment right to access.\textsuperscript{65}

Finally, the Media and Citizens criticized the district court's application of Federal Rule of Criminal Procedure 53, arguing that President Clinton's videotaped deposition testimony was not live testimony, and hence could not be afforded the protection allowed a live witness.\textsuperscript{66} The Media and Citizens argued that President Clinton actually received special treatment "because he was the one who requested permission to testify on videotape."\textsuperscript{67}

The Eighth Circuit affirmed the decision of the district court, holding that the district court did not abuse its discretion when it denied access to the videotape.\textsuperscript{68} The Eighth Circuit concluded that it did not need to confront the standing issue raised by Citizens because the district court disposed of the case based upon the common law and constitutional rights of the Media and Citizens, therefore making the standing issue moot.\textsuperscript{69} Furthermore, the Eighth Circuit held that the videotape was not a judicial record for purposes of the common law right of public access to judicial records.\textsuperscript{70} The Eighth Circuit reasoned that the videotape was not "documentary evidence," moreover,

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\item\textsuperscript{62} McDougal, 103 F.3d at 656; Donna R. Moliere, Comment, \textit{The Common Law Right of Public Access When Audio and Video Tape Evidence in a Court Record is Sought for Purposes of Copying and Disseminating to the Public}, 28 Loy. L. Rev. 163, 168 (1982). The Presidential Recordings Act was passed by Congress during the "Watergate" scandal and specifically enacted to provide for the ultimate public distribution of historical materials associated with "Watergate" such as President Nixon's audio tapes. \textit{Nixon v. Warner Communications, Inc.}, 435 U.S. 589, 603, 606 (1978).
\item\textsuperscript{63} 732 F. Supp. 170 (D.D.C. 1990).
\item\textsuperscript{64} McDougal, 103 F.3d at 656; \textit{United States v. Poindexter}, 732 F. Supp. 170, 171-72, 172 & n.2 (D.D.C. 1990).
\item\textsuperscript{65} McDougal, 103 F.3d at 656; Poindexter, 732 F. Supp. at 171.
\item\textsuperscript{66} McDougal, 103 F.3d at 656. Federal Rule of Criminal Procedure 53 provides: "The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court." FED. R. CRIM. P. 53.
\item\textsuperscript{67} Id.
\item\textsuperscript{68} Id. at 658-59.
\item\textsuperscript{69} Id. at 659.
\item\textsuperscript{70} Id. at 656.
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the court emphasized that its determination did not rest upon the fact that the videotape had not been entered into evidence. The court further reasoned that unlike the audiotapes in Warner Communications which involved the primary conduct of President Nixon, the videotape in the present case did not evince the primary conduct of President Clinton. Finally, the court reasoned that its decision was consistent with Federal Rule of Criminal Procedure 53, which prohibits recording live testimony, because it ensured that Rule 15 deponents were treated equally. In the alternative, the Eighth Circuit held that even if the videotape were a judicial record to which the common law right attached, the district court's denial of access to the videotape did not constitute an abuse of discretion because the Eighth Circuit takes a deferential view toward a trial court's "consideration of competing values" in determining which records to make available to the public.

Although the Eighth Circuit recognized that there was a presumption in favor of access, it nevertheless upheld the district court's reliance on four factors, which the Eighth Circuit concluded weighed heavily against release of the videotape. First, the Eighth Circuit agreed that "substantial access" to the information contained in the videotape was provided. Second, the court determined that release of the videotape would have been contrary to the prohibition on cameras in the courtroom under Rule 53 of the Federal Rules of Criminal Procedure. Third, the Eighth Circuit agreed that in prior decisions pertaining to videotaped testimony of incumbent presidents, such tapes were not disclosed. Finally, the court determined that there was a possibility for misuse of the videotape if it was released.

In addition to the factors relied on by the district court, the Eighth Circuit added three more factors, which it determined provided additional support for the district court's decision not to release the videotape. The Eighth Circuit reasoned that by providing the press with the videotape, the court would further the press' commercial plans, and as a matter of public policy the judiciary should avoid becoming a means of commercial or private pursuits.

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71. Id. at 656-57.
72. Id. at 657.
73. Id. (citations omitted).
74. Id. at 657-58.
75. Id. at 658.
76. Id. at 658.
77. Id. at 658.
78. Id.
79. Id.
80. Id. at 658-59.
81. Id. at 658.
ther analysis, the court stated that releasing the videotape of President Clinton's testimony could discourage future testimony in criminal trials. Finally, without citing supporting authority, the court reasoned that there was a "judicial tradition of proscribing public access to recordings of testimony given by a sitting president."

The Eighth Circuit concluded by holding that the denial of access did not violate the First Amendment because the public and press were provided access to the contents of the videotape. The court relied on Warner Communications where the Supreme Court denied broadcasters access to the "Watergate" tapes under the First Amendment on the basis that there were no restrictions on access to or publication of information within the public domain. The Supreme Court reasoned that broadcasters were provided with transcripts of the audio tapes and were permitted to listen to them when they were played in court.

BACKGROUND

I. JUDICIAL RECORD

The common law right of members of the public to inspect and copy judicial and other government records antedates the Constitution and is sometimes termed the "right of access." However, the common law right of access is not absolute. The United States Supreme Court has "made it clear that common law and First Amendment access rights must be weighed against countervailing interests such as national security, the right to a fair trial and, to a lesser degree, privacy interests, trade secret protections, and the efficacy of ongoing law enforcement efforts." While courts fully appreciate the existence of the common law right of access to judicial records, there is evidence of judicial confusion over what constitutes a judicial record. Black's Law Dictionary defines a judicial record as "dockets or records

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82. Id.
83. Id. 658-59.
84. Id. at 659.
85. Warner Communications, 435 U.S. at 609.
86. Id.
90. See infra notes 87-118 and accompanying text.
of judicial proceedings.” The Federal Rules of Appellate Procedure extend the definition of a judicial record to encompass all of the papers and exhibits in a district court file, including nondocumentary exhibits such as audio and video tapes.

In accordance with the Federal Rules of Appellate Procedure, the Seventh Circuit held that the common law right of access applies to all items in the record. In Smith v. United States District Court, the United States Court of Appeals for the Seventh Circuit held that the common law right of access to judicial records was not limited to items in evidence. The Seventh Circuit found that judicial records include everything that was part of a court proceeding. In Smith, the petitioner brought a pro se action to obtain a copy of a formal memorandum of the Clerk of the Court for the Southern District of Illinois which was sent to all of the judges in the district. The memorandum included statistics on the number of occasions the state had asked for and received extensions in prisoner civil rights cases and recommended denying such future requests. Smith, the petitioner, requested a copy of the clerk's memorandum after a judge, relying on the memorandum, denied an extension in a prisoner civil rights case. The clerk of the court denied Smith's request and Smith sought an injunction barring the clerk from withholding the memorandum. Without further analysis the district court denied Smith's request for an injunction.

On appeal, the United States Court of Appeals for the Seventh Circuit vacated and remanded the decision of the district court denying the injunction. The government argued that the memorandum was not accessible because it had not been admitted into evidence, and thus did not fall within the purview of the common law right of ac-

92. See FEDERAL RULE OF APPELLATE PROCEDURE 10(a) which provides, “The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court,” FED. R. APP. P. 10(a). See also FEDERAL RULE OF APPELLATE PROCEDURE 11(b) which provides, “Physical exhibits other than documents . . . shall not be transmitted by the clerk unless he is directed to do so,” FED. R. APP. P. 11(b).
93. Id.; Smith v. United States Dist. Court for the S. Dist. of Illinois, 956 F.2d 647, 650 (7th Cir. 1992) (citations omitted).
94. 956 F.2d 647 (7th Cir. 1992).
95. Smith, 956 F.2d at 650 (citations omitted).
96. Id. at 650 (citations omitted).
97. Id. at 647-48.
98. Id. at 648.
99. Id.
100. Id. 648-49.
101. Id. at 649.
102. Id. at 651
However, the Seventh Circuit rejected this argument and found that judicial records include everything in the record regardless of whether it was entered into evidence because "the policy behind the common law right of access is that what transpires in the courtroom is public property." The Seventh Circuit stressed that judicial records include all of the "materials on which a court relies in determining the litigant's substantive rights . . .." The court reasoned that the memorandum at issue was read in open court and, therefore was part of the court proceeding. The court further reasoned that while the decision regarding access may involve discretion, in this case, the district court did not appropriately weigh the interests of both parties.

The Sixth Circuit also reviewed the common law right of access to judicial records, but unlike the Seventh Circuit concluded that a transcript not admitted into evidence was not a judicial record. In United States v. Beckham, the United States Court of Appeals for the Sixth Circuit held that an item which was not admitted into evidence was not a judicial record. In Beckham, a Detroit city official was one of several defendants accused of defrauding the city. Members of the news media ("Media") sought contemporaneous access to tape recordings, transcripts of the recordings and documentary exhibits used in the underlying criminal trial. The District Court for the Eastern District of Michigan denied the Media's request reasoning that, in light of the defendant's right to a fair trial, it was appropriate to delay access until the completion of the trial. In further support of its decision, the district court noted that the transcripts were inaccurate. The court reasoned that the transcripts were prepared merely as a visual aid to assist the jury in following the audio and video tapes presented at trial, and emphasized that the transcripts were not admitted into evidence because they were at variance with the tapes. The Media appealed the district court's decision to deny

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103. Id. at 650.
104. Id. at 650 (citations omitted).
105. Id. (citations omitted).
106. Id.
107. Id. at 651.
109. 789 F.2d 401 (6th Cir. 1986).
110. Beckham, 789 F.2d at 411 (citations omitted).
111. Id. at 403.
112. Id. at 403-04.
113. Id. at 405.
114. Id. at 411.
115. Id. at 403-04.
contemporaneous access to the United States Court of Appeals for the Sixth Circuit.\textsuperscript{116}

On appeal, the Sixth Circuit affirmed in part and reversed in part the decision of the district court.\textsuperscript{117} The court held that the district court's denial of permission to duplicate the tape recordings and transcripts did not constitute an abuse of discretion, but that it was an abuse of discretion to deny the Media permission to copy the documentary exhibits.\textsuperscript{118} The Sixth Circuit recognized that while the common law right extended to tape recordings, the fair trial rights of the defendants were paramount to the Media's right to copy the tapes.\textsuperscript{119} The court further reasoned that the district court was correct to deny the Media's request to copy the transcripts because the transcripts were not admitted into evidence and admission into evidence is crucial to the public's right of access to judicial records.\textsuperscript{120} However, the court found that failure to allow the Media to copy documentary exhibits constituted an abuse of discretion because the exhibits included business records and documents and, therefore, the court determined it was unlikely that the documents would be misinterpreted if they were viewed outside the courtroom.\textsuperscript{121}

Not only do courts differ over whether an item must be admitted into evidence in order to be considered a judicial record, judicial opinion also differs as to whether a videotape of witness testimony which was admitted into evidence constitutes a judicial record.\textsuperscript{122} In In re Application of CBS, Inc. (United States v. Salerno),\textsuperscript{123} the United States Court of Appeals for the Second Circuit held that the broadcast media was entitled to access to the videotaped deposition testimony of a witness.\textsuperscript{124} In Salerno, a representative of the broadcast media moved for permission to copy the videotaped deposition of Roy L. Williams, a former General President of the Teamsters, who was serving a federal prison sentence on unrelated charges.\textsuperscript{125} The United States District Court for the Southern District of New York denied the motion.\textsuperscript{126} The district court reasoned that the common law right of access did not apply to videotaped deposition testimony because it was

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\textsuperscript{116} Id. at 405.
\textsuperscript{117} Id. at 403.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 414-15.
\textsuperscript{120} Id. at 411.
\textsuperscript{121} Id. at 412.
\textsuperscript{122} See infra notes 124-148 and accompanying text.
\textsuperscript{123} 828 F.2d 958 (2d Cir. 1987).
\textsuperscript{124} In re Application of CBS, Inc. (United States v. Salerno), 828 F.2d 958, 959 (2d Cir. 1987) [hereinafter Salerno].
\textsuperscript{125} Salerno, 828 F.2d at 958-59.
\textsuperscript{126} Id. at 959.
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not "real evidence." According to the court, the videotaped deposition was analogous to live testimony because the deposition room was an extension of the courtroom and, therefore, the rule against filming trials applied with equal force to the videotape. Alternatively, the district court concluded that even if the common law right were applied, the privacy interests of the deponent outweighed the presumption in favor of access because the deponent was serving a federal prison sentence. CBS, Inc., a representative of the broadcast media, appealed the decision of the district court to the United States Court of Appeals for the Second Circuit.

On appeal, the Second Circuit reversed the district court, holding that the common law right to copy and inspect judicial records was applicable to videotaped deposition testimony and the privacy interests of the deponent were not sufficiently compelling to overcome the presumption. The Second Circuit reasoned that the Federal Rules of Criminal Procedure expressly provided for the videotaping of depositions, and the fact that there were no provisions prohibiting the copying of such evidence weighed in favor of access. In addition, the Second Circuit noted that the accuracy of a videotape as opposed to a transcript could enhance the reporting of trials. Finally, the Second Circuit found that even though the decision regarding access may involve the discretion of the trial court, the court's discretion was restricted by the strength of the presumption in favor of public access, and according to the Second Circuit the district court in the present case did not overcome that presumption.

Although the Second Circuit recognized that a videotaped deposition was a judicial record, one federal district court came to a different conclusion, and held that the right of access did not encompass videotaped recordings. In In re Application of American Broadcasting Company, Inc. the United States District Court for the District of Columbia held that the common law right of access did not encompass the videotaped deposition testimony of a witness. In American Broadcasting, the interests of CBS, Inc., CNN, Inc., and NBC, Inc.

127. Id.
128. Id. (citations omitted).
129. Id.
130. Id. at 958.
131. Id. at 959.
132. Id. at 959-60.
133. Id. at 960.
134. Id. at 960-61.
were represented by ABC, Inc. ("Broadcasters") in an attempt to gain access to the videotaped deposition testimony of actress Jodie Foster in the underlying criminal prosecution of John W. Hinckley, Jr. \textsuperscript{138} Hinckley was charged with the attempted assassination of President Ronald Reagan and in conjunction with the assassination attempt, Hinckley had sent a death threat to Foster. \textsuperscript{139} Due to her schedule, Foster was unable to testify personally; therefore, she testified via videotape pursuant to Federal Rule of Criminal Procedure 15. \textsuperscript{140} Broadcasters moved for permission to copy the videotaped testimony of Foster for public broadcast. \textsuperscript{141} Counsel for Foster requested that the district court retain exclusive custody of the videotape and that the videotape not be labeled as an exhibit or formally admitted into evidence. \textsuperscript{142} The district court denied Broadcasters' request to copy the videotape, holding that the common law right of access did not encompass videotaped testimony. \textsuperscript{143} The district court reasoned that Foster's videotape was testimonial evidence as opposed to "real evidence" evincing the activities of a criminal defendant. \textsuperscript{144} In the alternative, the district court held that even if the videotaped testimony fit within the realm of the common law right of access, the safety and privacy interests of Foster outweighed the right. \textsuperscript{145} The district court reasoned that Foster was "not a criminal defendant but a witness who was unwittingly ensnared" in Hinckley's attempt to assassinate President Reagan. \textsuperscript{146} The district court concluded that because Foster's life was also threatened, the broadcast of her testimony could jeopardize her personal security. \textsuperscript{147}

II. THE FOUNDATION OF THE RIGHT OF ACCESS TO JUDICIAL RECORDS AND PROCEEDINGS

Provided that a judicial record exists and is one to which the common law right of access attaches, the court is faced with the issue of whether access to the judicial record should be granted. \textsuperscript{148} The common law right of access to judicial records originated in England, per-

\textsuperscript{138} \textit{Id.} at 1170.
\textsuperscript{139} \textit{Id.} at 1170 n.1.
\textsuperscript{140} \textit{Id.} at 1170.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 1171-72.
\textsuperscript{144} \textit{Id.} at 1171.
\textsuperscript{145} \textit{Id.} at 1172-73.
\textsuperscript{146} \textit{Id.} at 1172.
\textsuperscript{147} \textit{Id.} at 1172-73.
\textsuperscript{148} \textit{See supra} notes 88-148 and accompanying text; \textit{see infra} notes 150 to 349 and accompanying text.
haps as early as 1372. Although all persons enjoyed the right in England, the right could be asserted only when the person asserting it "had a sufficient interest in the records, such as a proprietary interest or the need to use them in a legal action."  

American courts have construed the common law right more liberally than their English counterparts: "since the late nineteenth century, American courts have recognized that all citizens have a right of access to judicial and other government records as a principle consistent with democracy and open government." It has been recognized that in order for people to exercise their constitutional rights, to understand the function of their government, and to be able to effectively hold their public servants accountable, the public must have access to governmental information. The right of access to judicial records is undiscriminating; it applies equally to traditional court records as well as to exhibits in taped form. A product of the electronic revolution, audio and video tape trial evidence is the newest version of a judicial record. Audio and videotaped evidence "combined with the capabilities of the broadcast media to transmit perfect copies of it to widespread audiences, has resulted in increased interest in the common-law right . . . ."

The landmark decision of Nixon v. Warner Communications Inc. is the only Supreme Court case to directly examine the legitimacy of the media's assertion of a right of access to audio tapes as judicial records. In Warner Communications, the United States Supreme Court acknowledged the existence of a common law right of access to inspect and copy judicial and other public records. Warner Communications developed as the result of United States v. Mitchell, the underlying criminal prosecution of former President Richard Nixon's advisors associated with the "Watergate" affair. John Mitchell and six other defendants ("Defendants") were indicted

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150. Marburger, 44 U. Pitt. L. Rev. at 650.
151. Id.
152. Id.
154. Romanowich, 44 U. Pitt. L. Rev. at 653.
155. Id. at 648.
for conspiring to obstruct justice pursuant to the investigation of the burglary of the Democratic National Committee headquarters in 1972.\textsuperscript{161} John Mitchell was President Nixon's Attorney General, as well as the head of the Committee for the Re-election of President Nixon.\textsuperscript{162} In \textit{Mitchell}, the Watergate Special Prosecutor issued President Nixon a subpoena \textit{duces tecum} directing him to produce audio tape recordings of meetings and telephone conversations which took place in the White House and Oval Office ("Watergate tapes").\textsuperscript{163} Approximately twenty-two hours of tape recorded conversations were played for the jury and the reels of tape were entered into evidence.\textsuperscript{164} Broadcasters sought permission to inspect and copy portions of President Nixon's Watergate tapes.\textsuperscript{165} The United States District Court for the District of Columbia denied access, holding that, until the Defendants' pending appeals from their respective convictions were decided, the Watergate tapes could not be distributed.\textsuperscript{166} The district court reasoned that immediate distribution of the audio tapes and the marketing that would follow could impair the Defendants' rights to a fair trial, should their convictions be reversed and new trials required.\textsuperscript{167}

Broadcasters appealed the decision of the district court to the United States Court of Appeals for the District of Columbia.\textsuperscript{168} The court of appeals reversed, holding that the Watergate tapes were court records subject to the common law right to inspect and copy.\textsuperscript{169} The court also held that neither the mere possibility of prejudice to the Defendants' rights in the event of a retrial nor the privacy concerns of President Nixon were sufficient to support denial of access.\textsuperscript{170} The court reasoned that second trials of the defendants were hypothetical and the President's privacy interests were not infringed because the Watergate tapes had already been played in open court.\textsuperscript{171} President Nixon petitioned the United State Supreme Court for \textit{certiorari}.\textsuperscript{172} The Supreme Court granted \textit{certiorari} to consider whether the District

\begin{itemize}
  \item \textsuperscript{161} \textit{Id.} at 592 & n.1.
  \item \textsuperscript{162} \textit{Id.} at 592 n.1.
  \item \textsuperscript{163} \textit{Id.} at 591; A Subpoena \textit{duces tecum} is defined as "[a] court process, initiated by a party in litigation, compelling production of certain specific documents and other items, material and relevant to facts and in issue in a pending judicial proceeding, which documents and items are in custody and control of a person or body served with process." \textsc{Black's Law Dictionary} 1426 (6th ed. 1990).
  \item \textsuperscript{164} \textit{Id.} at 594.
  \item \textsuperscript{165} United States v. Mitchell, 551 F.2d 1252, 1254 (D.D.Cir. 1976).
  \item \textsuperscript{166} Mitchell, 551 F.2d at 1255.
  \item \textsuperscript{167} \textit{Id.} at 1257.
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.} at 1255, 1261-63, 1265.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Id.} at 1261-63.
  \item \textsuperscript{172} \textit{Warner Communications}, 435 U.S. at 591.
\end{itemize}
Court for the District of Columbia should have released to Broadcasters the tapes admitted into evidence during the criminal trial of the Defendants.\textsuperscript{173}

On appeal, the Supreme Court reversed the decision of the court of appeals to grant access, and affirmed the decision of the district court denying access.\textsuperscript{174} The Supreme Court recognized that the common law right was essentially a presumption, "however gauged," in favor of access.\textsuperscript{175} Although the Court recognized the presumption of access, the Court indicated that the decision of whether or not to grant access was generally a matter of discretion left to the trial court.\textsuperscript{176} The Supreme Court determined that in exercising such discretion the trial court should weigh "the interests advanced by the parties in light of the public interest and the duty of the courts."\textsuperscript{177} However, the Court held that the Presidential Recordings Act, passed by Congress during the Watergate scandal and specifically enacted to provide for the ultimate public distribution of historical materials such as the Watergate tapes, was dispositive of the case.\textsuperscript{178} The Court reasoned that the Presidential Recordings Act provided a substitute means of public access which ensured that the Watergate tapes would be available for copying in the future and, therefore, tipped the scale in favor of refusing release at the present time.\textsuperscript{179}

Since its ruling in \textit{Warner Communications}, the Supreme Court has not directly addressed the right of access to judicial records.\textsuperscript{180} However, subsequent Supreme Court decisions which addressed the issue of a constitutional right to attend criminal trials have been applied in subsequent appellate court decisions regarding media requests to copy evidentiary recordings.\textsuperscript{181} The analogy between the common law right of access to judicial records and the constitutional right to open trials is typically sustained by the fact that both rights support the goals of an open and participatory democracy.\textsuperscript{182} As one commentator stated, "[t]he common law right of public access, while not constitutionally measured, is grounded upon the same fundamental policies of democracy as the First Amendment's protections of free-

\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 602.
\textsuperscript{176} Id. at 603.
\textsuperscript{177} Id. at 602.
\textsuperscript{178} Id. at 603.
\textsuperscript{179} Id. at 606.
\textsuperscript{180} Foster, 10 W. NEW ENG. L. REV. at 99.
\textsuperscript{181} Id. at 99-100.
\textsuperscript{182} Marburger, 44 U. PITT. L. REV. at 651; Mitchell, 551 F.2d at 1258 (quoting JAMES MADISON, 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910).
dom of speech and freedom of the press and the Sixth Amendment guarantee of a fair trial, . . .” 183

In the landmark case of Richmond Newspapers v. Virginia, 184 the Supreme Court recognized the constitutional right to access to criminal proceedings, a holding which has come to serve as additional support for the common law right of access. 185 In Richmond Newspapers, the United States Supreme Court held that the right of the public and press to attend criminal trials is constitutionally guaranteed under the First and Fourteenth Amendments. 186 In Richmond Newspapers, a newspaper sought access to the closed criminal trial of a man who was indicted for murder. 187 Pursuant to a motion made by counsel for the defendant, the trial court closed the criminal proceeding to the public without making any findings to support closure. 188 The trial court denied Richmond Newspapers (“Newspaper”) motion to vacate the closure order reasoning that it was the fourth time the defendant had stood trial and the possibility that information could be inaccurately published by the media and seen by jurors favored closure. 189

The Newspaper appealed the district court’s closure order and petitioned the Virginia Supreme Court for writs of mandamus and prohibition. 190 The Virginia Supreme Court dismissed the petitions and denied the petition for appeal after finding no reversible error. 191 The Newspaper petitioned the United States Supreme Court for certiorari. 192 The Supreme Court granted certiorari to consider whether the United States Constitution guaranteed the public and press the right to attend criminal trials. 193

187. Richmond Newspapers, 448 U.S. at 559.
188. Id. at 559, 580.
189. Id. at 561. The defendant’s conviction after the first trial was reversed on appeal and two subsequent retrials ended in mistrials. Id.
190. Richmond Newspapers, 448 U.S. at 562. A writ of mandamus is defined as: “[t]he name of a writ which issues from a court of superior jurisdiction, and is directed to a private or municipal operation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived. A writ issuing from a court of competent jurisdiction, commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law.” Black’s Law Dictionary 961 (6th ed. 1990).
191. Id. at 562.
192. Id.
193. Id. at 558.
On appeal, the United States Supreme Court reversed the decision of the trial court, holding that "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."\(^\text{194}\) The Supreme Court held that the right to attend trials is protected by the explicit First Amendment guarantees of speech and press.\(^\text{195}\) The Supreme Court found that the First Amendment guarantee applied to the States through the Fourteenth Amendment.\(^\text{196}\) Moreover, the Supreme Court reasoned, openness of trials promotes many valuable goals, including public confidence in the judicial system and a safe outlet for public hostility and concern.\(^\text{197}\)

The Supreme Court's decision in *Richmond Newspapers* established the First Amendment right to access to criminal trials, and the Court's decision in *Globe Newspaper Co. v. Superior Court*\(^\text{198}\) fixed the standard of review applicable to the right.\(^\text{199}\) The United States Supreme Court held in *Globe Newspaper* that to justify the exclusion of the press and public from criminal trials, the state must show that closure is "required by a compelling state interest and is narrowly tailored to further that interest."\(^\text{200}\) In *Globe Newspaper*, the Superior Court for Norfolk County Virginia ordered the exclusion of the public and press from the courtroom during the trial of a defendant charged with the rape of three minor girls.\(^\text{201}\) *Globe Newspaper Co.* ("Globe") sought to intervene in the proceeding in order to assert its right to public access to the trial, and requested not only that the court revoke its order closing the proceeding, but also hold hearings regarding any future orders.\(^\text{202}\) The trial court, relying on a Massachusetts statute providing for the exclusion of the public from the trial of a sex offender whose victim is under the age of eighteen, denied Globe's motion.\(^\text{203}\)

Immediately after the trial court issued its order, Globe requested injunctive relief from the Supreme Judicial Court of Massachusetts, arguing that it should be allowed to attend the full criminal trial as

\(^{194}\) *Id.* at 581.

\(^{195}\) *Id.* at 575.

\(^{196}\) *Id.* at 575-80.

\(^{197}\) *Id.* at 556.

\(^{198}\) 457 U.S. 596 (1982).


\(^{200}\) *Globe Newspaper*, 457 U.S. at 606-07.

\(^{201}\) *Id.* at 598-99.

\(^{202}\) *Id.* at 599.

\(^{203}\) *Id.* at 598 n.1, 599. *Mass. Gen. Laws Ann.*, ch. 278, § 16A (West 1981 & Supp. 1997) provides in pertinent part: "[a]t the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case. *Mass. Gen. Laws Ann.*, ch. 278, § 16A (West 1981 & Supp. 1997).
guaranteed by the First and Sixth Amendments. Globe's request for relief was denied. The rape trial concluded and the defendant was acquitted before Globe could appeal to the full court. On appeal, the full Massachusetts Supreme Judicial Court construed the Massachusetts statute as requiring, under all circumstances, the exclusion of the press and public during the testimony of a minor victim in a sex offense trial. Globe petitioned the United States Supreme Court for certiorari. The Supreme Court granted certiorari to determine whether the statute, as interpreted, violated the First Amendment by virtue of the Fourteenth Amendment.

On appeal, the Supreme Court reversed the decision of the Massachusetts Supreme Judicial Court. The court held that where a state attempts to refuse the right of access to a criminal trial in order to inhibit disclosure of sensitive information, it must be shown that denial is required by a compelling state interest and is narrowly tailored to further that interest. The Supreme Court reasoned that although a state's interest in protecting minor victims of sex crimes from further trauma and embarrassment was compelling, it did not justify a statute requiring, under all circumstances, exclusion of the press and public during the testimony of a minor victim. Rather, the Supreme Court found that the trial judge should ascertain in a case-by-case manner whether closure is required to protect the well-being of a minor victim.

In furtherance of the Supreme Court's holding in Richmond Newspapers that there is a constitutionally protected right to access to criminal proceedings, one court has recognized that the media plays an important role in the function of this right by attending the proceedings and reporting what transpired to the public. "Access to judicial records has been viewed as a necessary component to the right of access to trials." For instance, some courts have determined that

205. Id. at 600.
206. Id.
207. Id. at 598.
208. Id. at 601.
209. Id. at 598.
210. Id. at 606-07, 610-11.
211. Id.
212. Id. at 607-08.
213. Id. at 608.
the right of access to judicial records ensures that members of the public, who were unable to attend a judicial proceeding, may see for themselves the evidence that resulted in an acquittal or conviction and may thus evaluate the proceeding. One court held that denying members of the public "physical access to evidentiary materials deprives the public of a meaningful opportunity to understand the proceeding, and therefore amounts to a denial of public access to the proceeding 'in a significant way.'" The Supreme Court decisions of Warner Communications, Richmond Newspapers, and Globe Newspaper set the stage for future federal court decisions regarding media requests to copy evidentiary audio and video recordings. In 1980 and 1981, three circuit courts addressed the issue of the media's right to copy audio and video taped evidence used in criminal trials. "Abscam," an undercover Federal Bureau of Investigation ("FBI") "sting," led to a series of cases where the judiciary permitted the media to copy and broadcast videotapes which had been admitted into evidence in criminal proceedings. In 1978, law enforcement officials devised an undercover operation to ascertain whether public officials would accept bribes if provided with the opportunity to do so. To facilitate their plan, FBI agents and a paid informant engineered a "sting" operation, using Abdul Enterprises Ltd., a fictitious business, as a cover. Public officials were offered substantial sums of money in exchange for sponsoring private congressional bills and influencing the Executive Branch in an attempt to solve the immigration problems of the Abdul "businessmen." The FBI secretly recorded the transactions of the undercover agents and their targets on audio and video tapes. The Abscam sting resulted in the following three criminal actions in which Na-

216. Id.
217. Id. at 652. United States v. Dorfman, 8 MEDIA L. REP. (BNA) 2249, 2255 n.12 (N.D. Ill. Sept. 7, 1982), aff'd, 8 MEDIA L. REP. (BNA) 2372 (7th Cir. Oct. 25, 1982) (discussing access to material introduced at a pretrial evidentiary hearing). See also United States v. Hubbard, 650 F.2d 293, 330 (D.C. Cir. 1980) (MacKinnon, J., dissenting) (holding that a judicial proceeding cannot be considered public if the public is denied access to the evidence admitted as relevant to the issues before the court).
218. Foster, 10 W. NEW ENG. L. REV. at 99-100, 109.
220. Marburger, 44 U. PIT. L. REV. at 647.
221. In re Application of Nat'l. Broadcasting Co.(United States v. Myers), 635 F.2d 945, 947 (2d Cir. 1980)[hereinafter Myers].
222. Id.
223. Id.
224. Id.
tional Broadcasting, Inc. served as the media representative ("Broad-
casters") to obtain access to the audio and video tapes used in the
criminal trials.\(^{225}\)

In In re Application of National Broadcasting Co. (United States v.
Myers),\(^{226}\) the United States Court of Appeals for the Second Circuit
found that there was a strong presumption in favor of the common law
right of access and held that broadcasters were entitled to videotapes
entered into evidence during the criminal prosecution.\(^{227}\) In Myers,
Congressman Michael O. Myers and other public officials were tried
for bribery and other related charges.\(^{228}\) The District Court for the
Eastern District of New York granted Broadcasters' application to du-
plicate and broadcast all videotapes admitted into evidence.\(^{229}\) The
district court released the tapes to the press and public, reaffirming
that common law principles mandated access, absent a strong show-
ing to the contrary.\(^{230}\)

The defendants appealed the decision of the district court to the
United States Court of Appeals for the Second Circuit, arguing that
their rights to a fair trial would be impaired by release of the tapes.\(^{231}\)
The Second Circuit affirmed the decision of the district court granting
access, reasoning that the likelihood of enhanced awareness of the
tapes did not pose the kind of risk to fair trials sufficient to justify
curtailing the right of access to courtroom evidence.\(^{232}\) The Second
Circuit determined that "[o]nce evidence has become known to the
members of the public, including representatives of the press, through
their attendance at a public session of court, it would take the most
extraordinary circumstances to justify restrictions on the opportunity
of those not physically in attendance at the courtroom to see and hear
the evidence, when it is in a form that readily permits sight and sound
reproduction."\(^{233}\) Furthermore, the Second Circuit also found that the
presumption in favor of access is especially strong when the evidence
pertains to actions of public officials.\(^{234}\)

In the second Abscam case, In re Application of National Broad-
casting Co., (United States v. Criden),\(^{235}\) the United States Court of
Appeals for the Third Circuit, like the Second Circuit, held that

\[\text{References:}\]
\(^{225}\) Romanowich, 32 Am. U. L. Rev. at 264-67.
\(^{226}\) 635 F.2d 945 (2d Cir. 1980).
\(^{227}\) Myers, at 947, 952.
\(^{228}\) Id. at 947.
\(^{229}\) Id.
\(^{230}\) Id. at 949.
\(^{231}\) Id.
\(^{232}\) Id. at 953-54.
\(^{233}\) Id. at 952.
\(^{234}\) Id.
\(^{235}\) 648 F.2d 814 (3d Cir. 1981).
Broadcasters were entitled to copy video tapes and audio tapes admitted into evidence. In *Criden*, two members of the Philadelphia City Council were tried in the United States District Court for the Eastern District of Pennsylvania on charges of bribery and other related offenses. The district court denied Broadcasters' application for permission to copy for the purpose of broadcasting to the public both the audio and video tapes which had been admitted into evidence. In support of its decision, the district court reasoned that the accused, as well as innocent relative and friends, would be subjected to penalties not prescribed by law as the result of widespread publicity of the tapes. The court further reasoned that broadcasting the tapes to the public would create difficulty in selecting a jury for the pending trial of additional defendants and would unveil libelous statements involving third parties contained on the tapes. Finally, the court reasoned that broadcasting the tapes would violate the prohibition against televising courtroom proceedings.

Broadcasters appealed the decision of the district court to the United States Court of Appeals for the Third Circuit, arguing that the district court's failure to release the tapes contravened the presumption in favor of access, and further, that the court had considered improper factors in reaching its decision. The Third Circuit reversed the decision of the district court and held that Broadcasters were entitled to copy the audio and video tapes, "except for that material which the district court explicitly determine[d] to be impermissibly injurious to third parties." The Third Circuit noted that the media functions as surrogates for the public because "instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media." The Third Circuit reasoned that the strong common law presumption in favor of access, in addition to the fact that the public would obtain an educational and informational benefit from the broadcast of evidence raising significant issues of public interest and concern, weighed in favor of access.

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237. Id. at 815.
238. Id. at 816.
239. Id.
240. Id.
241. Id.
242. Id. at 816-817.
243. Id. at 829.
244. Id. at 824. (quoting *Richmond Newspapers*, 448 U.S. at 572-73).
245. Id. at 829.
In the third Abscam case, In re Application of National Broadcasting Co. (United States v. Jenrette), the United States Court of Appeals for the District of Columbia similarly held that Broadcasters were entitled to access to videotaped evidence. In Jenrette, former Congressman John W. Jenrette and John R. Stowe, like the defendants in the other Abscam cases, were tried for bribery and other related charges in the United States District Court for the District of Columbia Circuit. Broadcasters' pretrial application for access to the tapes was denied. The district court determined that the potential harm in the event of release outweighed any possible public benefit. The district court reasoned that it would be hard to select an impartial jury in the event the tapes were released and a retrial was required.

Broadcasters appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit. The District of Columbia Circuit reversed the decision of the district court, holding that the district court abused its discretion in denying Broadcasters' application. However, the court also held that innocent third persons were entitled to file objections to the release of those segments of the tapes which would inflict unwarranted injury upon them. The court granted access to the tapes, reasoning that the public had a fundamental interest in learning about the actions of the defendants as well as those of law enforcement agents. According to the court, the countervailing interests were insufficient to overcome the presumption in favor of access provided that innocent third parties retained the right to object.

In Belo Broadcasting Corp. v. Clark, a case involving an entirely separate FBI "sting," the United States Court of Appeals for the Fifth Circuit interpreted the presumption in favor of access differently than the Second, Third, and District of Columbia Circuits. The
Fifth Circuit interpreted the presumption in favor of access, as acknowledged by the Supreme Court in *Warner Communications*, as only one of several competing interests to be weighed in passing upon an application for access.\(^{259}\) In *Belo Broadcasting*, the United States Court of Appeals for the Fifth Circuit held that the fair trial rights of a yet-to-be tried defendant were sufficient to overcome the common law right of access.\(^{260}\) In *Belo Broadcasting*, the Speaker of the Texas House of Representatives, one Texas labor official and two Texas attorneys were indicted as the result of an FBI "sting" operation, the "Brilab" investigation, pertaining to the alleged bribery of public officials responsible for state employee insurance contracts.\(^{261}\) The trial of L.G. Moore, a Texas labor official, was severed from the trial of the remaining defendants.\(^{262}\) The evidence presented at the criminal trial of the remaining defendants included audio tapes of conversations between the defendants and FBI agents.\(^{263}\) The United States District Court for the Southern District of Texas denied Belo Broadcasting Corporation's ("Broadcasters") request to copy the audio tapes containing conversations between defendants and the FBI.\(^{264}\) The district court reasoned that widespread publication of the tapes outside of the courtroom would severely prejudice the fair trial rights of defendant Moore, whose trial was still pending.\(^{265}\)

After an appeal by Broadcasters, the Fifth Circuit affirmed the decision of the district court denying access.\(^{266}\) The Fifth Circuit held that the press' First Amendment right of access to the audiotapes was not violated because the information within the public domain was available to the press.\(^{267}\) The court further held that the district court did not abuse its discretion in denying Broadcasters' common law right of access to the audio tapes because the district court's decision was based on preserving the fair trial rights of one of the defendants.\(^{268}\) While the Fifth Circuit acknowledged the "presumption in favor of access," it interpreted the Supreme Court's opinion in *Warner Communications* as advocating a pure deferential standard with regard to judicial records.\(^{269}\) The Fifth Circuit reasoned that because there were no clear rules as to when judicial records should be sealed,

\(^{259}\) *Belo Broadcasting*, 654 F.2d at 434-35.

\(^{260}\) *Id.* at 423.

\(^{261}\) *Id.* at 425.

\(^{262}\) *Id.* at 425 & n.1.

\(^{263}\) *Id.* at 425.

\(^{264}\) *Id.*

\(^{265}\) *Id.*

\(^{266}\) *Id.* at 425, 434.

\(^{267}\) *Id.* at 426-27.

\(^{268}\) *Id.* at 431.

\(^{269}\) *Id.* at 433-34.
the decision as to access was one best left to the discretion of the trial court.270

The Fifth Circuit's decision in Belo Broadcasting created a split in the circuits regarding the treatment of the common law right of access.271 However, "[i]n 1982, the Seventh Circuit Court of Appeals attempted to reconcile the extreme positions taken in the Abscam cases and Belo Broadcasting when it reviewed a media request to copy evidentiary recordings in a case arising out of an investigation into the corrupt practices of an Indiana state senator."272

In United States v. Edwards,273 the United States Court of Appeals for the Seventh Circuit recognized a strong presumption in favor of the common-law right of access, yet held that the defendant's constitutional right to a fair trial was sufficient to overcome the presumption.274 In Edwards, Martin K. Edwards, an Indiana State Senator and President Pro Tempore of the Indiana Senate, and Francis B. Kendall, a private businessman, were indicted for making illegal monetary payments in exchange for influencing legislation.275 Edwards was separately charged with tax evasion.276 An audio tape of a telephone conversation between Edwards and a third party was played to the jury and admitted into evidence.277 Full transcripts of the conversation on the audio tape were printed in Indianapolis newspapers.278 Video-Indiana, Inc., a television station, and Mid-America Radio, Inc., a radio station, ("Broadcasters") requested permission to duplicate the audio tape for public broadcast.279 The United States District Court for the Southern District of Indiana, Indianapolis Division, denied broadcasters' application.280 The district court reasoned that the pendency of the trial was a factor in favor of denying access that deserved considerable weight.281 The district court further reasoned that Edwards had not yet stood trial for tax evasion and broadcast of the tape could have made jury selection especially difficult.282 Finally, the district court concluded that the United States Judicial Conference's ban against broadcast of trials also weighed in favor of

270. Id. at 430.
271. Foster, 10 W. NEW ENG. L. REV. at 121.
272. Id.
273. 672 F.2d 1289 (7th Cir. 1982).
274. United States v. Edwards, 672 F.2d 1289, 1294, 1296-97 (7th Cir. 1982).
275. Edwards, 672 F.2d at 1290.
276. Id. at 1291.
277. Id. at 1290-91.
278. Id. at 1291.
279. Id.
280. Id. at 1289, 1291.
281. Id. at 1291.
282. Id.
denying access. Broadcasters appealed the decision of the district court denying access to the United States Court of Appeals for the Seventh Circuit.

On appeal, although the Seventh Circuit affirmed the decision of the district court denying access, it recognized a strong presumption in favor of access. The Seventh Circuit held "where there is a clash between the common law right of access and a defendant's constitutional right to a fair trial, a court may deny access, but only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture." The court stressed that it was essential for a court to state clearly the basis for its holding in order to permit an appellate court to review whether relevant factors were evaluated and accorded appropriate weight. In affirming the district court's decision denying access, the Seventh Circuit reasoned that the pending tax evasion charges against Edwards made a future trial more than hypothetical and, therefore, the district court was correct to deny access. However, the court also reasoned that while the pendancy of Edwards' current trial was an appropriate factor to consider, the pendancy of a trial did not necessarily control the decision of whether or not to grant access. The court further reasoned that the United States Judicial Conference's ban on the broadcast of trials was not a relevant factor when the evidentiary materials sought for duplication were recordings of previous events.

III. THE RIGHT OF ACCESS APPLIED TO VIDEOTAPE PRESIDENTIAL TESTIMONY

The common law right of access to evidentiary tape recordings affected not only former President Richard Nixon but Ronald Reagan was also confronted with a situation in which the media sought access to his videotaped trial testimony. Former President Ronald Rea-
gan was subpoenaed to testify in a criminal trial after he left office. In United States v. Poindexter, the United States District Court for the District of Columbia allowed the media to view the videotaped deposition testimony of former President Ronald Reagan prior to trial and concluded that the videotape would be available for copying after it was played at trial. In Poindexter, John M. Poindexter, former National Security Advisor to President Ronald Reagan, was tried on criminal charges arising from the "Iran Contra Affair." Poindexter subpoenaed former President Ronald Reagan to compel former President Reagan's testimony at trial. Former President Reagan testified via videotaped deposition pursuant to Federal Rule of Criminal Procedure 15. The media requested permission for contemporaneous access and the opportunity to copy the videotaped deposition. The district court held that the media was entitled to view former President Reagan's deposition testimony before it was played at trial, and the media was also provided with transcripts of the videotape. The district court did not allow the media to copy the videotape prior to trial. However, the court indicated its intention to provide copies after the videotape was played at trial.

The district court reasoned that the media should view the videotape and be provided with a transcript of it prior to trial because, "under the mandate of the First Amendment and appellate decisions, access to that testimony [could] not be withheld for several weeks or months until the evidence [was] actually used at the trial." In addition, the district court reasoned, in light of the right of access to criminal proceedings and the fact that the press and public were not permitted to attend the actual deposition of President Reagan, which was a segment of the Poindexter trial, the videotape should not be...

292. See infra notes 295-306 and accompanying text.
293. See infra notes 295-306 and accompanying text.
298. Id. at 171.
299. Id. at 173.
300. Id. at 171, 173.
301. Id. at 172 & n.2.
302. Id.
303. Id. at 171.
However, the district court reasoned that early release of the videotape and subsequent widespread publication could pose jury selection problems and interfere with the fair trial rights of the defendant and; therefore, decided not to furnish copies of the videotape prior to trial.305

IV. THE EIGHTH CIRCUIT'S INTERPRETATION OF THE RIGHT OF ACCESS

The Eighth Circuit's interpretation of the right to inspect and copy judicial records is contrary to that of the Second, Third, Seventh and District of Columbia Circuits.306 Instead, it resembles the minority interpretation adopted by the Fifth Circuit in *Belo Broadcasting Corp. v. Clark.*307 Beginning first with *United States v. Webbe,*308 and continuing through *In re Search Warrant for Secretarial Area Outside Office of Gunn,*309 and *Webster Groves School District v. Pulitzer Publishing Co.,*310 the Eighth Circuit defined its position on the media’s common law and constitutional rights of access to judicial records.311

In *United States v. Webbe,* the Eighth Circuit set forth the test to be applied when determining whether access to judicial records should be granted.312 In *Webbe,* the United States Court of Appeals for the Eighth Circuit held that a television station was not allowed to copy the audio tapes associated with a criminal prosecution.313 In *Webbe,* Sorkis Webbe Jr., an Alderman and Democratic Party Committeeman for the Seventh Ward of St. Louis, Missouri and three other defendants were tried for vote and mail fraud and obstruction of justice.314 Audio tapes of conversations taking place at a hotel in St. Louis where Webbe was president and general manager were admitted into evidence at trial.315 During the trial, CBS, Inc. (“CBS”) sought permission from the District Court for the Eastern District of Missouri to copy the audio tapes, but the request was denied.316 After noting that Webbe was a public official and that the press had been granted access to the trial and transcripts of the tapes, the district court held that the

304. Id.
305. Id. at 172-73.
306. Compare supra notes 219-291 and accompanying text with infra notes 313-349 and accompanying text.
307. Id.
308. 791 F.2d 103 (8th Cir. 1986); see infra notes 313-26 and accompanying text.
309. 855 F.2d 569 (8th Cir. 1988); see infra notes 327-37 and accompanying text.
310. 898 F.2d 1371 (8th Cir. 1990); see infra notes 338-49 and accompanying text.
311. See infra notes 313-49 and accompanying text.
312. See infra notes 313-26 and accompanying text.
313. United States v. Webbe, 791 F.2d 103, 104 (8th Cir. 1986).
314. Webbe, 791 F.2d at 104.
315. Id.
316. Id.
media's right of access was insufficient to outweigh the defendant's constitutional right to a fair trial.\textsuperscript{317}

CBS appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit, arguing that the district court erred in denying its request because it had a constitutional and common law right to duplicate the tapes.\textsuperscript{318} CBS alleged that "its constitutional right of access emanate[d] from the First Amendment right of the public and the press to observe the judicial process."\textsuperscript{319} In addition to numerous other appellate decisions, CBS cited Warner Communications in support of its assertion that the strong presumption in favor of the common law right mandated access to the judicial records.\textsuperscript{320}

The Eighth Circuit affirmed the decision of the district court denying CBS' application to copy the audiotapes.\textsuperscript{321} The Eighth Circuit rejected CBS' argument that its right of access was protected by the First Amendment.\textsuperscript{322} In so doing, the Eighth Circuit relied on Warner Communications, where the Supreme Court concluded that neither the First nor Sixth Amendments supported a right of access to the Watergate tapes, because the press had been allowed full access to all public information, including transcripts of the tapes.\textsuperscript{323} In addition, the Eighth Circuit reasoned that CBS' common law right of access was not absolute and the decision of whether or not to grant access should be left to the trial court's discretion.\textsuperscript{324} The Eighth Circuit determined that the district court had legitimate concerns regarding the defendant's fair trial rights and potential jury selection problems which tipped the scale in favor of denying access.\textsuperscript{325}

The Eighth Circuit refined its position on the test regarding access to judicial records when in In re Search Warrant for Secretarial Area Outside Office of Gunn, it held that the First Amendment right to access could only be overcome by demonstrating a compelling government end.\textsuperscript{326} The United States Court of Appeals for the Eighth Circuit held in Gunn that a newspaper was not entitled to access to documents filed in support of a search warrant.\textsuperscript{327} In Gunn, the Pulit-
zer Publishing Company ("Pulitzer"), a newspaper publisher, filed a motion to unseal documents supporting the issuance of a search warrant executed as part of an ongoing investigation into alleged bribery in the defense industry.328 Two of the search warrants were issued for employees of a defense contractor.329 In denying Pulitzer's motion to unseal the documents, the District Court for the Eastern District of Missouri reasoned that unsealing the documents would prejudice the government's ongoing investigation by affording individuals the "opportunity to tailor their testimony and destroy documents and other evidence, and by prematurely disclosing the existence of wiretaps and other investigatory tools."330

Pulitzer appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit.331 The Eighth Circuit affirmed the district court's decision denying access, holding that documents filed in support of search warrants were encompassed by the First Amendment right of public access, but that such documents could be sealed if the court specifically found that doing so was necessary to protect a compelling government end.332 The Eighth Circuit found that the compelling interest test was satisfied because unsealing the documents involved would compromise the government's ongoing investigation.333 The Eighth Circuit reasoned that the First Amendment right of public access extends to documents filed in support of search warrants because "search warrant applications and receipts are routinely filed with the clerk of court without seal and under the common-law judicial records and documents have been historically considered to be open to inspection by the public."334 The court further reasoned that "public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct."335 The court ultimately concluded that "proceedings may be closed and, by analogy, documents may be sealed if 'specific, on the record, findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to that interest.'"336
The Eighth Circuit further refined its test regarding the right to access to judicial records in *Webster Groves School District v. Pulitzer Publishing Co.* where the court added the protection of minors to the list of factors that justified denying access.\(^{337}\) In *Webster*, the United States Court of Appeals for the Eighth Circuit held that a newspaper was not entitled to attend court room proceedings, review the case file, or intervene in an action for a preliminary injunction.\(^{338}\) In *Webster*, a public school student, who was classified as handicapped, carried a loaded handgun to school and threatened his classmates with it.\(^{339}\) The student was suspended and subsequently expelled from school.\(^{340}\) The Webster School District received a temporary restraining order and sought a preliminary injunction to prevent the student from attending school prior to the exhaustion of his administrative remedies to challenge the expulsion.\(^{341}\) For purposes of the preliminary injunction hearing, the courtroom was closed pursuant to a request by counsel for the student.\(^{342}\) Pulitzer Publishing Company ("Pulitzer"), a newspaper publisher, filed motions to intervene in the action, open the courtroom and to unseal the case file.\(^{343}\) However, the District Court for the Eastern District of Missouri denied all of Pulitzer's motions.\(^{344}\) Pulitzer appealed the district court's decision to shield the proceedings and seal the case file to the United States Court of Appeals for the Eighth Circuit.\(^{345}\) The Eighth Circuit affirmed the district court's decision, holding that Pulitzer was not allowed to attend the courtroom proceedings, review the case file, or intervene in the action.\(^{346}\) The Eighth Circuit reasoned that there was "a strong public policy favoring the special protection of minors and their privacy where sensitive and possibly stigmatizing matters are concerned . . . [and that the] policy applied forcefully to students classified as handicapped."\(^{347}\) Therefore, the Eighth Circuit concluded that the district

\(^{337}\) *Webster Groves Sch. Dist. v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1375 (8th Cir. 1990); see supra notes 338-49 and accompanying text.

\(^{338}\) *Webster*, 898 F.2d at 1373, 1377-78.

\(^{339}\) *Id.* at 1373.

\(^{340}\) *Id.*

\(^{341}\) *Id.* (citing *Honig v. Doe*, 484 U.S. 305, 327 (1988) which held pursuant to 20 U.S.C. § 1415 (1987), that a school may temporarily prohibit a disabled child who is dangerous from attending school).

\(^{342}\) *Id.* 898 F.2d at 1373.

\(^{343}\) *Id.*

\(^{344}\) *Id.*

\(^{345}\) *Id.*

\(^{346}\) *Id.* at 1377-78.

\(^{347}\) *Id.* at 1375. The court noted that "the privacy of juveniles was protected by the legislatures and the courts of this country in a variety of ways. For example, in Missouri 'the general public shall be excluded' from juvenile court hearings. Mo. Rev. Stat. § 211.171.5 (1986). Juvenile court records are neither to be inspected nor disclosed, except to those who have a legitimate interest in them. *Id.* § 211. 321. Certain juvenile
court was correct in closing the proceedings as well as declining to unseal the records in the interest of protecting a minor.348

ANALYSIS

In United States v. McDougal,349 the United States Court of Appeals for the Eighth Circuit declined to release the videotaped deposition testimony of President Clinton to interested members of the press and public.350 In affirming the district court's decision, the Eighth Circuit held that the district court did not abuse its discretion in denying access to the videotape under either the common law right of access to judicial records or the First Amendment.351 However, an examination of Supreme Court, federal appellate court, and Eighth Circuit precedent in particular, indicates that the Eighth Circuit was incorrect in affirming the decision of the district court denying the requests of the press and public to copy the videotaped testimony of President Clinton.352

The Eighth Circuit's holding in McDougal invites four points of criticism.353 First, the Eighth Circuit declined to recognize President Clinton's videotaped deposition testimony as a judicial record when evidentiary video and audio tapes have been recognized as judicial records by the Supreme Court and other circuit courts.354 Second, the Eighth Circuit failed to give the presumption in favor of the common law right of access as set forth by the Supreme Court in Warner Communications, Inc.,355 appropriate weight.356 Third, in light of the factors recognized by the Supreme Court and other circuits, the factors articulated by the Eighth Circuit in support of denying access were

348. Webster, 898 F.2d at 1374-77.
349. 103 F.3d 651 (8th Cir. 1996), cert. denied by, Citizens United v. United States, 118 S.Ct. 49 (1997).
351. McDougal, 103 F.3d at 654.
352. See supra notes 88-349 and accompanying text.
353. See infra notes 22-87 and accompanying text.
inadequate to overcome the presumption. Finally, the Eighth Circuit's rationale for denying access under the First Amendment arguably did not satisfy its own compelling interest test.

I. Videotape as a Judicial Record

As the Supreme Court recognized in Warner Communications, there is a common law right of access to inspect and copy judicial records. In addition, the Federal Rules of Appellate Procedure set forth that nondocumentary evidence, or items such as audio and video tapes, are recognized as part of the court record and, therefore, are judicial records. Although not binding on the Eighth Circuit, in In re Application of CBS, Inc. (United States v. Salerno), the Second Circuit has held that the common law right to inspect and copy judicial records is applicable to videotaped deposition testimony. The Second Circuit reasoned that because Federal Rule of Criminal Procedure 15 explicitly permits the substitution of videotaped deposition testimony for live in-court testimony and implicitly allows the copying of such evidence, videotaped testimony constituted a judicial record. However, In re Application of American Broadcasting Co., the United States District Court for the District of Columbia limited the definition of a "judicial record," excluding the videotaped deposition testimony of well-known actress whose life had been threatened, in order to protect her safety and privacy.

Furthermore, the Seventh Circuit in Smith v. United States District Court, found that judicial records include all of the items in the record regardless of whether they were admitted into evidence.

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358. In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 571 (8th Cir. 1988) (citations omitted); McDougal, 103 F.3d at 659 & n.16.


361. 828 F.2d 958 (2d Cir. 1987).

362. Salerno, 828 F.2d at 959.

363. Id. at 959-60.


366. 956 F.2d 647 (7th Cir. 1992).

The Seventh Circuit reasoned that the policy behind the common law right is "what transpires in the courtroom is public property" and, therefore, judicial records include all of the materials presented in court that are subsequently relied on in determining the substantive rights of the litigants. In contrast, in United States v. Beckham, the Sixth Circuit based its decision that transcripts of audio and video tapes were not judicial records on the fact that the transcripts were inaccurate and had been purposely kept out of evidence for that reason. The fact specific holdings of Beckham and American Broadcasting are arguably distinguishable from the broad interpretation of a judicial record by the Second and Seventh Circuits because Beckham and American Broadcasting involved special circumstances which likely motivated the respective courts in those cases to construe the meaning of a judicial record as narrowly as possible.

In McDougal, the Eighth Circuit supported its decision that the videotaped deposition testimony of President Clinton was not a judicial record by drawing a comparison to the Watergate tapes at issue in Warner Communications. According to the Eighth Circuit, while the Watergate tapes involved the primary conduct of President Nixon and were thus a judicial record, the videotape in the present case did not involve the primary conduct of President Clinton and, therefore, was not a judicial record. However, President Clinton's videotaped testimony was in fact a part of the McDougal trial. Furthermore, if the court had adopted the Seventh Circuit's rationale in Smith, the videotape would have been a judicial record regardless of whether it revealed primary conduct of President Clinton because the court considered the testimony in determining the substantive rights of the litigants. Furthermore, even if primary conduct were an issue, President Clinton's conduct was indirectly involved because the McDougals were tried for charges associated with their involvement in the Whitewater affair, a scandal in which President Clinton was also allegedly involved.

368. Smith, 956 F.2d at 650 (quoting In re Application of CBS, Inc. (United States v. Shannon), 540 F.Supp. 769, 771 n.3 (N.D. Ill. 1982) which held that the strong presumption in favor of public access to judicial records may be rebutted when conflicting interests arise between the defendant's right to a fair trial and the public's right of access).
369. 789 F.2d 401 (6th Cir. 1986).
371. See supra notes 109-22 and 136-48 and accompanying text.
372. McDougal, 103 F.3d at 657.
373. Id.
374. Smith, 956 F.2d at 650.
375. Id.
In further support of its determination that the videotape was not a judicial record, the Eighth Circuit reasoned that its decision was consistent with Federal Rule of Criminal Procedure 53, which prohibits electronic recording of live testimony, because it ensured that Rule 15 deponents were treated equally. However, according to the Third Circuit's holding in In re Application of National Broadcasting Co. (United States v. Criden), the ban against cameras in the courtroom is irrelevant to the determination of whether the media was entitled to copy the videotape because the videotape involved testimony which had already transpired, rather than contemporaneous live testimony subject to behavior modification. Moreover, the Eighth Circuit did not cite any authority indicating that it was necessary to treat live witnesses and Rule 15 deponents equally. Furthermore, a witness becomes a Rule 15 deponent by choice; therefore, it is unclear why the Eighth Circuit insisted that it was the court's job to ensure that a Rule 15 deponent was treated the same as a live witness.

II. COMMON LAW RIGHT OF ACCESS TO INSPECT AND COPY JUDICIAL RECORDS

A. The Presumption in Favor of the Common Law Right of Access

While the Supreme Court may have set forth a discretionary standard regarding the common law right of access in Warner Communications, the Court implied that the presumption in favor of access should play a significant role in a trial court's decision of whether to grant access to judicial records. A majority of circuit courts that have addressed the issue have determined that the presumption in favor of the common law right of access is strong. For example, in the Abscam cases the Second, Third, and District of Columbia Circuits accurately applied the test set forth in Warner Communications by according appropriate weight to the presumption in favor of access.

In In re Application of National Broadcasting Co. (United States v. Criden), the Third Circuit found that there was a strong presumption in favor of the common law right of access to judicial

377. McDougal, 103 F.3d at 657.
380. McDougal, 103 F.3d at 651-60.
381. FED. R. CRIM. P. 15; See supra note 27.
382. Id. at 599, 602-03; See supra notes 157-80 and accompanying text.
383. See infra notes 226-57 and 274-91 and accompanying text.
384. Myers, 635 F.2d 945, 952-953 (2d Cir. 1980); Criden, 648 F.2d at 823, 829; Jenrette, 653 F.2d 609, 612-13 (D.C. Cir. 1981).
RIGHT OF ACCESS

records, and that potential jury selection problems in a subsequent trial, as well as the prohibition against televising courtroom proceedings, were insufficient to overcome the presumption.\(^{386}\) In Criden, the Third Circuit reasoned that access to the audio and video tapes used at trial was especially important because the trial raised issues of significant public interest and concern.\(^{387}\) Likewise, in re Application of National Broadcasting Co. (United States v. Myers),\(^{388}\) the Second Circuit held that only the "most compelling circumstances" should inhibit access to evidentiary tapes.\(^{389}\)

Finally, in In re Application of National Broadcasting Co. (United States v. Jenrette),\(^{390}\) the United States Court of Appeals for the District of Columbia emphasized that "any denial or infringement of this 'precious' and 'fundamental' common law right remains subject to appellate review for abuse."\(^{391}\) In Jenrette, the court held that access to evidentiary tapes should be denied "only when justice so requires."\(^{392}\) The court found that potential jury selection problems in the event of a retrial did not constitute a situation where justice required denying access.\(^{393}\) The court reasoned that access was especially important because "the trial raised issues of major public importance relating to the conduct . . . of government law enforcement agents."\(^{394}\)

Furthermore, in United States v. Edwards,\(^{395}\) the Seventh Circuit found that there was a strong presumption in favor of access even though the court ultimately held that the defendant's constitutional right to a fair trial was sufficient to overcome the presumption.\(^{396}\) The Seventh Circuit found that if there is a clash between the common law right of access and a defendant's constitutional right to a fair trial, a court "may deny access, but only on the basis of articulable facts known to the court" and, therefore, the Seventh Circuit determined that a court may not deny access based on a subsequent hypothetical trial.\(^{397}\)

In Belo Broadcasting Corp. v. Clark\(^{398}\) the Fifth Circuit rejected the trend of the Second, Third, Seventh and District of Columbia Circuits and interpreted the presumption articulated by the Supreme

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\(^{386}\) Id. at 823-28.
\(^{387}\) Id. at 829.
\(^{388}\) 635 F.2d 945 (2d Cir. 1980).
\(^{389}\) Myers, 635 F.2d 945, 952 (2d Cir. 1980).
\(^{390}\) 653 F.2d 609 (D.C. Cir. 1981).
\(^{391}\) Jenrette, 653 F.2d 609, 613 (D.C. Cir. 1981).
\(^{392}\) Jenrette, 653 F.2d 609, 613 (D.C. Cir. 1981) (citations omitted).
\(^{393}\) Id. at 612, 621.
\(^{394}\) Id. at 620-21.
\(^{395}\) 672 F.2d 1289 (7th Cir. 1982).
\(^{396}\) United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982).
\(^{397}\) Edwards, 672 F.2d at 1294.
\(^{398}\) 654 F.2d 423 (5th Cir. Unit A Aug. 1981).
Court in Warner Communications differently. The Fifth Circuit, after criticizing its fellow circuits for awarding the presumption in favor of access too much weight, arguably gave the presumption entirely insufficient weight. While the Fifth Circuit acknowledged the presumption, it failed to truly honor it. The Fifth Circuit interpreted the presumption as merely “one factor to be weighed on the media's side of the scale.” While “the Supreme Court in Warner Communications did not establish the weight to be accorded the presumption in favor of access, the common law right embodies First Amendment values that should augment the deference accorded by courts to the right.”

In McDougal, the Eighth Circuit adopted the reasoning of the Fifth Circuit in Belo Broadcasting by refusing to accord the presumption in favor of access sufficient weight. Although in McDougal the Eighth Circuit acknowledged the existence of the presumption in favor of access, the court minimized the presumption based upon the fact that the court did not recognize a strong presumption like its fellow circuits. By adopting the Fifth Circuit's analysis in Belo Broadcasting, the Eighth Circuit, in McDougal, failed to give the presumption in favor of the common law right of access, as acknowledged by the Supreme Court in Warner Communications, appropriate weight. Furthermore, as identified by the Supreme Court, the presumption in favor of access should only be superseded by national security concerns, the constitutional right to a fair trial and, “to a lesser degree, privacy interests, trade secret protections and the efficacy of ongoing law enforcement efforts” none of which the Eighth Circuit found in McDougal.

399. Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 433 (5th Cir. Unit A Aug. 1981). The Seventh Circuit joined the trend of the Second, Third and District of Columbia Circuits when it rendered it decision in United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982), a ruling which came out after the Fifth Circuit's decision in Belo Broadcasting. Edwards, 672 F.2d at 1294.


402. Id. at 434.

403. Belo Broadcasting, 654 F.2d at 430, 433-34.

404. McDougal, 103 F.3d at 657-58.

405. Id. at 657.

406. McDougal, 103 F.3d at 657-58; Romanowich, 32 Am. U. L. Rev. at 273; See supra notes 22-87 and 258-71 and accompanying text.

407. Keller, 15 WM. MITCHELL L. REV. at 754. The Eighth Circuit in McDougal relied upon questions of substantial access, likelihood for misuse of the videotape, videotape of prior sitting presidents, prohibition on cameras in the courtroom, the court's cooperation in furthering commercial endeavors, desire to ensure that witnesses would
B. Eighth Circuit Factors Outweighing the Presumption in Favor of Access

1. “Substantial Access” Provided

In declining to release President Clinton’s videotaped deposition testimony for duplication the Eighth Circuit, like the district court, cited *Warner Communications* and held that “substantial access” to the information contained in the videotape was afforded because members of the press and public were present at the trial when the videotape was played and transcripts of the testimony were provided.\(^{408}\) In *Warner Communications*, the Supreme Court denied access to the Watergate tapes under the common law right relying on the fact that through the Presidential Recordings Act Congress had already provided the press and public with access.\(^{409}\) Unlike in *Warner Communications*, where the Presidential Recordings Act guaranteed that the Watergate tapes would ultimately be available for copying, there was no statute guaranteeing access to President Clinton’s videotape in the present case.\(^{410}\) Thus, the Eighth Circuit arguably irrevocably foreclosed interested members of the press and public from ever copying, or for those who were not present at trial, viewing President Clinton’s testimony.\(^{411}\) Therefore, the videotape should have been released.\(^{412}\)

2. Prohibition on Televising Live Testimony

In affirming the district court, the Eighth Circuit also held that release of the videotape would be contrary to the prohibition on cameras in the courtroom.\(^{413}\) However, President Clinton’s deposition testimony was not taken in a courtroom, rather, it was taken at the White House pursuant to his request.\(^{414}\) While Federal Rule of Criminal Procedure 53 may prohibit cameras in the courtroom and, therefore, electronic recording of live testimony, President Clinton’s testimony was not live.\(^{415}\) Moreover, according to Federal Rule of Criminal Procedure 15, it is perfectly acceptable to testify at trial via videotaped deposition and there is no rule against copying such testimony, as was noted by the Second Circuit in *In re Application of CBS*, McDougal, 103 F.3d at 658-59.

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\(^{408}\) “Substantial Access” Provided

\(^{409}\) Warner Communications, 435 U.S. at 603, 606, 608. Compare Warner Communications, 435 U.S. at 603, 606, 608 with McDougal, 103 F.3d at 651-60.

\(^{411}\) See supra notes 407-09 and accompanying text.

\(^{413}\) See supra note 86.
In (United States v. Salerno). Furthermore, in Salerno the Second Circuit also noted that the justifications for the ban on cameras in the courtroom had only the most limited application to videotaped depositions. Therefore, Rule 53 is arguably inapplicable to President Clinton's videotaped deposition and, thus, it would have been acceptable to release it.

3. Testimony of Past Presidents

In support of the district court's determination, the Eighth Circuit held that prior videotaped testimony of sitting presidents had not been released. In arriving at that conclusion, the district court had compared President Clinton's situation to that of President Ford. However, unlike President Clinton, the videotaped testimony of President Ford was not associated with a political or public scandal in which he was allegedly involved. The Eighth Circuit rejected the media's argument that the release of President Reagan's videotaped testimony pertaining to the "Iran-Contra Affair," a political scandal in which he was allegedly involved, required the release of the videotape in McDougal. As with President Reagan's situation in United States v. Poindexter, President Clinton's videotaped testimony pertained to his alleged association with the Whitewater affair, a public scandal, which is a matter of public interest and concern. Therefore, President Clinton's situation is arguably more analogous to President Reagan's which dictates that the videotape should have been released.

4. Potential for "Misuse" of Videotape Testimony

Like the district court, the Eighth Circuit concluded that there was potential for misuse of President Clinton's videotaped testimony. The Eighth Circuit noted that the videotape could be distorted through cutting and splicing and used to President Clinton's

417. Salerno, 828 F.2d at 959.
418. See supra notes 411-15 and accompanying text.
420. McDougal, 940 F. Supp. at 228.
425. See supra notes 418-23 and accompanying text.
426. McDougal, 103 F.3d at 658.
disadvantage. However, "potential for misuse" is hypothetical and according to the Seventh Circuit in *United States v. Edwards*, a court is not justified in denying access unless the decision to do so is founded upon "articulable facts." Moreover, in In re Application of CBS, Inc. (*United States v. Salerno*), the Second Circuit noted that "the accuracy of a videotape as opposed to a transcript could enhance the accurate reporting of trials." In addition, in *Myers* the Second Circuit held that "once evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence when it is in a form that readily permits sight and sound reproduction."

In *Poindexter*, the United States District Court for the District of Columbia allowed the press to view President Reagan's videotaped testimony before it was played at trial and the court released the videotape for copying after trial because it found that "in light of the right to access to criminal proceedings and the fact that the press and public were not admitted to the actual deposition of President Reagan, which was a segment of the Poindexter trial, the videotape should not be kept secret." Further, because counsel for the parties in *McDougal* already edited the President's testimony by cutting and splicing, removing only "arguments of counsel," the videotape that was played in open court and most of the transcripts that were released were already altered. In addition, the fact that the deponent in *McDougal* was President Clinton and that his political or public status could be damaged by the release and, ultimately the distortion, of his videotaped testimony does not rise to the level of the factors articulated by the Supreme Court that would justify denying access. Furthermore, in *Myers* the Second Circuit found that the presumption in favor of access was especially strong when the evidence pertained to actions of public officials. Therefore, regardless of any potential for misuse and, in light of the fact that the videotape contained the testimony of

427. Id.
428. 672 F.2d 1289 (7th Cir. 1982).
429. *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982).
430. 828 F.2d 958 (2d Cir. 1987).
431. *Salerno*, 828 F.2d at 960.
432. *Myers*, 635 F.2d at 952.
434. *McDougal*, 103 F.3d at 653.
436. *Myers*, 635 F.2d at 952.
the highest-elected public official in this country, it should have been released.\textsuperscript{437}

5. Media's Intended Use of the Videotape

In Mc\textsuperscript{do}ugal, the Eighth Circuit reasoned that by providing the press with the videotape the court would be furthering the press' commercial plans and that, as a matter of public policy, the courts should not become instrumentalities of commercial pursuits.\textsuperscript{438} However, the Eighth Circuit did not support its reasoning with evidence that indicated that the press planned to do something more than broadcast the videotape.\textsuperscript{439} Furthermore, in Cr\textsuperscript{id}en, the Third Circuit noted that "the media functions as surrogates for the public because, rather than obtaining information about trials firsthand, people rely chiefly on the print and electronic media for that information."\textsuperscript{440} The Third Circuit found that "the strong common law presumption of access and the educational and informational benefit which the public would derive from broadcast of evidence introduced at a trial which raised significant issues of public interest" weighed in favor of access.\textsuperscript{441} Likewise, in Jen\textsuperscript{ret}te, the United States Court of Appeals for the District of Columbia found that "access to evidentiary tapes was especially important when the trial raised issues of significant importance to the public."\textsuperscript{442} Therefore, because the videotape in the present case contained the testimony of President Clinton regarding a public scandal in which he was allegedly involved, and broadcast of videotape by the media may have been the only opportunity for some to view the President's testimony, the videotape should have been released.\textsuperscript{443}

6. Effect on Future Testimony

The Eighth Circuit further reasoned in Mc\textsuperscript{do}ugal that release of the videotape could discourage future testimony in criminal trials.\textsuperscript{444} However, once again, the court's reasoning was based upon hypothetical future cases and, according to the Seventh Circuit in Edwards, a court is not justified in denying access based on "unsupported hypothesis or conjecture."\textsuperscript{445} Furthermore, if one is subpoenaed to testify in

\textsuperscript{437} See supra notes 424-35 and accompanying text.
\textsuperscript{438} Mc\textsuperscript{do}ugal, 103 F.3d at 658.
\textsuperscript{439} Id. at 658. In support of its statement that courts should not be used as instrumentalities of commercial endeavors, the Eighth Circuit quoted In re Cas\textsuperscript{we}ll, 29 A. 259 (1893).
\textsuperscript{440} Cr\textsuperscript{id}en, 648 F.2d 824.
\textsuperscript{441} Id. at 829-30.
\textsuperscript{442} Jen\textsuperscript{ret}te, 653 F.2d at 620-21.
\textsuperscript{443} See supra notes 436-40 and accompanying text.
\textsuperscript{444} Mc\textsuperscript{do}ugal, 103 F.3d at 658.
\textsuperscript{445} Id.; Edwards, 672 F.2d at 1294.
a criminal trial, there is no choice but testify either live or, where the circumstances dictate, by videotape. Therefore, release of the videotape would arguably have had little effect on future testimony in criminal trials.

7. "Traditions" Applicable to Presidential Testimony

Finally, the Eighth Circuit reasoned in McDougal that there was a "judicial tradition of proscribing public access to recordings of testimony given by a sitting president" and release of President Clinton's videotaped testimony would compromise the tradition. However, the court failed to cite any authority supporting such a proposition. Therefore, despite the Eighth Circuit's respective interpretation regarding Presidential testimony, the videotape should have been released.

III. CONSTITUTIONAL RIGHT TO ACCESS

In Richmond Newspapers, Inc. v. Virginia the United States Supreme Court held that the right of the public and press to attend criminal trials is constitutionally guaranteed by the First and Fourteenth Amendments. Expanding on the holding in Richmond Newspapers the United States Supreme Court in Globe Newspaper Co. v. Superior Court held that to justify the exclusion of the press and public from criminal trials, the state must show that closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Furthermore, courts have recognized that in order to fulfill the constitutionally guaranteed right to access to criminal trials, members of the press and public should be provided with access to judicial records. Courts have reasoned that access to judicial records is a necessary component to the constitutional right to

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446. Fed. R. Crim. P. 17(a). Federal Rule of Criminal Procedure 17(a) provides: "A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceedings, and shall command each person to whom it is directed, to appear and give testimony at the time and place specified therein." Fed R. Crim. P. 15(a). See supra note 27.

447. See supra notes 442-45 and accompanying text.

448. McDougal, 103 F.3d at 658-59.

449. Id. & 658 n.15. (relying on Poindexter despite the fact that former President Reagan "was not the sitting president at the time he testified.")

450. See supra notes 446-47 and accompanying text.


access to criminal proceedings because judicial records are documentation of the proceeding and access to them facilitates understanding.\footnote{Id.} Moreover, courts have reasoned that access to judicial records is especially important where members of the press or public were unable to exercise their right to access to a criminal proceeding.\footnote{Id.} For instance, those who were unable to attend a criminal proceeding may examine "the evidence which led to acquittal or conviction of a criminal and may thereby evaluate the proceeding."\footnote{Id.}

In In re Search Warrant for Secretarial Area Outside Office of Gunn,\footnote{855 F.2d 569 (8th Cir. 1988).} the Eighth Circuit discussed the First Amendment right of access.\footnote{In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 574 (8th Cir. 1988).} The Eighth Circuit found that "proceedings may be closed and, by analogy, documents may be sealed if 'specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to that interest.'"\footnote{Id. at 570, 574.} Therefore, the court held that the burden of proof is on the party seeking closure to satisfy the test.\footnote{Id. (citations omitted).} In Gunn, the Eighth Circuit held that the compelling government interest test was satisfied where release of documents filed in support of search warrants would severely prejudice the government's ongoing investigation of bribery in the defense industry.\footnote{United States v. Webbe, 791 F.2d 103, 104-07 (8th Cir. 1986).} Similarly, in United States v. Webbe,\footnote{United States v. Webbe, 791 F.2d 103, 104-07 (8th Cir. 1986).} the Eighth Circuit determined that the government had a significant interest in denying access to the audio tapes at issue, despite any First Amendment rights of the media, where the defendant's constitutional right to a fair trial was at stake.\footnote{898 F.2d 1371 (8th Cir. 1990).} Finally, in Webster Groves School District v. Pulitzer Publishing Co.,\footnote{Webster Groves School District v. Pulitzer Publishing Co., 898 F.2d 1371, 1373-75, 1777-78 (8th Cir. 1990).} the Eighth Circuit denied access to proceedings and a case file where opening the proceedings and allowing the press access to the case file would violate the "strong public policy favoring the special protection of minors and their privacy where sensitive and possibly stigmatizing matters are concerned."\footnote{Id.}

As set forth by the Supreme Court in Richmond Newspapers and Globe Newspaper, and adopted by the Eighth Circuit in Gunn, denial of the right to access to criminal proceedings and, by analogy, judicial
records from those proceedings, must be justified by a compelling governmental interest. In *McDougal*, the Eighth Circuit reasoned that denying access to President Clinton's videotaped testimony did not violate the First Amendment because the public and press were given access to the information contained in the videotape. However, unlike in *Gunn*, *Webbe*, or *Webster*, the issues in *McDougal* did not involve a risk of prejudicing an ongoing government investigation, a risk of jeopardizing the constitutional fair trial rights of the defendants, or a risk of violating the privacy interests of a handicapped minor. The foregoing cases indicate that the Eighth Circuit had only been willing to deny access where a compelling interest existed. However, in *McDougal*, the Eighth Circuit failed to articulate any compelling interest. Instead, the court maintained that the "substantial access" which had been granted to the press and public satisfied any rights to the information to which they were entitled under the First Amendment. Therefore, the Eighth Circuit arguably failed to satisfy its own test, as set forth in *Gunn*, in denying access to the videotape under the First Amendment.

**CONCLUSION**

In *United States v. McDougal*, the United States Court of Appeals for the Eighth Circuit denied members of the press and public access to the videotaped deposition testimony of President Clinton. In denying access to the videotape, the Eighth Circuit reasoned, pursuant to the Supreme Court's opinion in *Nixon v. Warner Communications, Inc.* and the Fifth Circuit's opinion in *Belo Broadcasting Corp. v. Clark*, that the decision as to access was discretionary. However, the Eighth Circuit was incorrect in denying the press and public access to the videotape.

First, the Federal Rules of Appellate Procedure as well as precedent indicate that President Clinton's videotaped deposition testimony is a judicial record subject to the common law right of access.

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468. Richmond Newspapers, 448 U.S. at 580; Globe Newspaper, 457 U.S. at 606-07; *Gunn*, 855 F.2d at 574; See *supra* notes 185-214 and 327-37 and accompanying text.

469. *McDougal*, 103 F.3d at 659.

470. See generally *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996), cert. denied by, *Citizens United v. United States*, 118 S.Ct. 49 (1997); *Gunn*, 855 F.2d at 574; *Webbe*, 791 F.2d at 104; *Webster*, 898 F.2d at 1375.

471. See *supra* notes 313-49 and accompanying text.

472. *McDougal*, 103 F.3d at 659.

473. Id.

474. *Gunn*, 855 F.2d at 574; See *supra* notes 324-34 and accompanying text.


477. 654 F.2d 423 (5th Cir. Unit A Aug. 1981).
Second, the Eighth Circuit failed to give the presumption in favor of access as acknowledged by the Supreme Court in *Warner Communications*, appropriate weight. Third, according to Supreme Court guidance, the reasons articulated by the Eighth Circuit in favor of denying access were insufficient to overcome the presumption. Finally, in light of its own test and precedent, the Eighth Circuit arguably failed to establish a compelling interest for denying access to the videotape under the First Amendment.

The Eighth Circuit's decision in *McDougal* is evidence of the confusion created by the Supreme Court's opinion in *Warner Communications*. The Court recognized that the common law right is essentially a presumption “however gauged,” in favor of access.478 While a majority of circuits have chosen to honor the presumption to its fullest extent because it embodies First Amendment values, the minority, including the Eighth Circuit, have given entirely insufficient weight to the presumption. The confusion created by *Warner Communications* is most disturbing because it has resulted in members of the press and public being irretrievably foreclosed from ever copying, or in some cases viewing, the videotaped testimony of the highest-elected public official in this country regarding a public scandal in which he was allegedly involved. The citizens of the United States of America have entrusted the President with the leadership of their county and he is, therefore, accountable to them for his actions. The fact that William Jefferson Clinton is the President of the United States does not serve to exempt his videotaped testimony from the common law and First Amendment rights of access but, instead, serves to make it more susceptible.

-Angela M. Lisec '99

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