THE ASSOCIATED PRESS, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent. UNITED STATES OF AMERICA, JOHN Z. DELOREAN, WILLIAM HETRICK and STEPHEN ARRINGTON, Real Parties in Interest. LOS ANGELES HERALD EXAMINER, a Division Of THE HEARST CORPORATION, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent. UNITED STATES OF AMERICA, JOHN Z. DeLOREAN, WILLIAM HETRICK, and STEPHEN ARRINGTON, Real Parties In Interest

Nos. 83-7242, 83-7255

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

705 F.2d 1143; 1983 U.S. App.9 Media L. Rep. 1617

April 28, 1983, Argued and Submitted
May 10, 1983, Filed

PRIOR HISTORY: Emergency Petition for Writ of Mandamus to United States District Court for the Central District of California. Hon. Robert M. Takasugi, District Judge, Presiding.

COUNSEL: For: L.A. Herald Examiner, Div. of the Hearst Corp: Stephen G. Contopulos, Esq, Flint & MacKay, Los Angeles, California, for: Associated Press: John A. Karaczynski, Esq., Rogers & Wells, Los Angeles, California.

For: CBS, Inc.: Jack B. Purcell, Herbert M. Schoenberg, Ira L. Kurgan, Los Angeles, California, for Appellant/Petitioner.

For: Delorean: Howard L. Weitzman, Donald M. Re, Weitzman & Re, Los Angeles, California, Co-Counsel Jerald W. Newton, Los Angeles, California, Joseph A. Ball, Esq., Ball, Hunt, Hart, Brow & Baerwitz, Long Beach, California, for: USCD: Donald Luke, Esq., Rogers & Wells, New York, New York, for Appellee/Respondent.

JUDGES: Hug, Poole, and Reinhardt, Circuit Judges. Poole, Circuit Judge, specially concurring.

OPINION BY: REINHARDT

OPINION

REINHARDT, Circuit Judge.

INTRODUCTION

In October 1982, Stephen Arrington, John DeLorean, and William Hetrick were indicted

in Los Angeles on charges of violating federal narcotics statutes. The legal proceedings surrounding DeLorean's indictment have created much public interest and received extensive coverage in the press. From the beginning of these proceedings until December 22, 1982, the district court records and files in the case were open to inspection by the press and public. On December 22, however, the district judge responded to the wide press coverage by ordering that all future filings of documents in the instant matter . . . shall be *in camera*. Said documents shall be filed under seal in order to permit this court to initially review them and to make a determination with regard to disclosure based on defendants' rights under the Sixth Amendment and the First Amendment rights of the public as set forth in *U.S. v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982).
This order was issued *sua sponte*, without any notice to, or opportunity to be heard by, the parties, the press, or the public. The order was not accompanied by any findings.

Various members of the press soon asked the district court to reconsider or stay the December 22 order. The district judge held a hearing on January 25, 1983 at which the views of the press, the defendants, and the prosecution were heard. Two months later, on March 22, 1983, the district judge denied the press's request to stay the December 22 order. He did so after writing a thorough opinion carefully analyzing the various issues. The court left in effect the requirement that *all* documents filed in the case be automatically sealed. However, the procedure for dealing with sealed documents was modified:
Upon this court's receipt of a submitted document, the clerk of this court shall notify The City News Service of said filing and indicate by title the document filed. All parties shall have 48 hours to submit written comments to this court regarding the propriety of sealing the subject document. Counsel for the named parties in the instant action shall file all comments under seal. At the expiration of the 48 hour response period, this court will promptly rule upon the unsealing or sealing of the subject document. This order in no way precludes this court from ordering the unsealing of a document prior to the expiration of the 48-hour period should it determine that sealing is unnecessary.
Although the order provides that the "parties" shall have an opportunity to comment, the district court's practice has been to allow the press to comment as well.

The Associated Press and the Los Angeles Herald Examiner, joined by several other news organizations, petitioned this court for a writ of mandamus directing the district court to vacate its December 22, 1982 and March 22, 1983 orders.

DISCUSSION

In *United States v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982), we held that the first amendment right of access to criminal trials also applies to pretrial proceedings such as suppression hearings. There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them. Indeed, the two principal justifications for the first amendment right of access to criminal proceedings apply, in general, to pretrial documents. Those two justifications are: "first, the criminal trial historically has been open to the press and general public," and "second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the

government as a whole." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 2619-20, 73 L. Ed. 2d 248 (1982). There can be little dispute that the press and public have historically had a common law right of access to most pretrial documents, *see, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978) -- though not to some, such as transcripts of grand jury proceedings. Moreover, pretrial documents, such as those dealing with the question whether DeLorean should be incarcerated prior to trial and those containing allegations by DeLorean of government misconduct, are often important to a full understanding of the way in which "the judicial process and the government as a whole" are functioning. We thus find that the public and press have a first amendment right of access to pretrial documents in general.

The first amendment right of access may sometimes conflict with a defendant's sixth amendment right to a fair trial. In these situations, we require that a party seeking closure of proceedings or sealing of documents establish that the procedure "'is strictly and inescapably necessary in order to protect the fair-trial guarantee.'" *Brooklier*, 685 F.2d at 1167 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 440, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979) (Blackmun, J., concurring)). To meet this burden and justify abrogating the first amendment right of access, it is necessary to satisfy three separate substantive tests. We find that the district court's orders fail to pass any of these tests. [1]

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[1] Because of the result we reach, we will only discuss the three substantive tests and need not consider whether the January 25, 1983 hearing and the March 22, 1983 order met the procedural tests set forth in *Brooklier. See* 685 F.2d at 1168-69. We note, however, that the December 22 order clearly did not.

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First, there must be "a substantial probability that irreparable damage to [a defendant's] fair-trial right will result" if the documents are not sealed. *Id*. There has been no such showing in this case sufficient to justify the blanket orders sealing (though for a limited period) all documents filed. Although the prosecution of DeLorean has attracted a great deal of publicity, there are many other cases that generate significant public interest. Yet documents in these other cases are routinely opened to the public without jeopardizing the fair trial guarantee. [2] As the Supreme Court has emphasized, "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically in every kind of criminal case to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976). *See also United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980) ("despite the extensive publicity about Abscam . . . about half of those summoned for jury selection had no knowledge of Abscam, and only a handful had more than cursory knowledge. Even the intensive publicity surrounding the events of Watergate . . . did not prevent the selection of [impartial] jurors" (citations omitted)). Because there has been no showing that access to pretrial documents will create a substantial probability of irreparable damage to defendants' fair trial rights, the district

court's orders do not satisfy this first test.

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2 The parties agree that the district court's order was precipitated by a newspaper report concerning a prosecution allegation that DeLorean had ties to the Irish Republican Army. The district judge made no specific findings on the impact of this news report. We think it clear, however, that the report was insufficient cause, under the *Brooklier* test, for the imposition of a blanket order sealing all documents.

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Second, there must be "a substantial probability that alternatives to closure will not protect adequately [the] right to a fair trial." *Brooklier*, 685 F.2d at 1167. In other words, there must be no less drastic alternative available. We believe that courts can readily devise less drastic procedures that will ensure that parties who contemplate filing any documents that might actually prejudice the right to a fair trial will act responsibly. Various procedures are available to trial judges to persuade parties to refrain from filing such documents or, if exceptional circumstances exist, to file the few documents of that nature that must be filed under seal. Moreover, based on the record before us, we believe that careful jury selection is an alternative that can adequately protect the right to a fair trial. *See, e.g., Nebraska Press Ass'n*, 427 U.S. at 563-64. In a large metropolitan area such as Los Angeles, with its millions of potential jurors, it is unlikely that " searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence" and "the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court," *id.* at 564, will fail to produce an unbiased jury, regardless of the nature of the pre-trial documents filed.

Third, there must be "a substantial probability that closure will be effective in protecting against the perceived harm." *Brooklier*, 685 F.2d at 1167. Despite the district court's two orders, all parties concede that the DeLorean prosecution continues to be the subject of substantial coverage in the press. There is currently no shortage of information for the press to exploit. Given the extensive publicity that is occurring even while the orders are outstanding, we doubt that the limitation on publicity accomplished by the closure orders would have any significant effect on DeLorean's right to a fair trial. *See, e.g., Globe Newspaper*, 457 U.S. at , 102 S. Ct. at 2621-22.

In sum, the district court orders fail to meet any of the three substantive tests. Moreover, the court's orders that seal each and every document filed impermissibly reverse the "presumption of openness" that characterizes criminal proceedings "under our system of justice," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) (plurality opinion). *See also Globe Newspaper*, 457 U.S. at , 102 S. Ct. at 2622. It is irrelevant that some of these pretrial documents might only be under seal for, at a minimum, 48 hours under the March 22, 1983 order. The effect of the order is a total restraint on the public's first amendment right of access even though the restraint is limited in time. [3] *See, e.g., Brooklier*, 685 F.2d at 1169-71. We perceive

nothing in the record of this case to warrant the use of such blanket orders. Consequently, we direct that the district court's December 22, 1982 and March 22, 1983 orders be vacated on the ground that they violate the public's first amendment right of access to criminal proceedings.

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[3] While the record is far from complete, it appears that the provision for prompt rulings (following a 48-hour comment period) on whether documents should be unsealed may be somewhat unrealistic and illusory. Although this is more than understandable, in view of the pressures of daily litigation under which the district judge and busy trial lawyers must operate, it only serves to emphasize one of the difficulties with blanket orders.

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FURTHER PROCEEDINGS

Ordinarily, documents sealed under an unconstitutional order would be released immediately. In this case, however, the orders sealed all documents to be filed on or after December 22. Thus, the parties may have filed documents in reliance on those orders rather than following the normal procedure of requesting the sealing of specific documents on an item-by-item basis. With regard to all documents currently under seal, therefore, the parties will have until 12:00 Noon on May 13, 1983 to make motions to seal any specific documents that they believe should remain sealed under the three-part *Brooklier* test. The district court must comply with the procedural as well as the substantive requirements established by *Brooklier*, 685 F.2d at 1168 -- 69, and should rule on these motions promptly. If the district judge decides that any documents should remain sealed, he must make "sufficiently specific" findings on a document-by-document basis
to show that the three substantive prerequisites to closure have been satisfied -- that there is a substantial probability (1) that public proceedings would result in irreparable damage to defendant's right to a fair trial, (2) that no alternative to closure would adequately protect this right, and (3) that closure would effectively protect it.
Id. If a document now under seal is not the subject of a timely closure motion, it will be unsealed immediately unless the court *sua sponte* decides to conduct a *Brooklier* hearing with respect to that document. [4]

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[4] Similarly, if any party wishes to make a motion that a document remain sealed for reasons unrelated to the fair trial right, such a motion shall also be made by 12:00 Noon on May 13, 1983.

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REMEDY

This is an appropriate case for the issuance of a writ of mandamus. *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982); *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977); *see Brooklier*, 685 F.2d at 1173. The writ will issue forthwith.

CONCUR BY: POOLE

CONCUR

POOLE, Circuit Judge, specially concurring:

I agree that the district court should not have imposed an across-the-board sealing of all documents filed and to be filed, and that such an order cannot stand in the light of *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982). It is the law of this court, "until the Supreme Court [otherwise] resolves these issues," *Brooklier* at 1167, that the procedural prerequisites and substantive findings set forth in *Brooklier* must be observed before closure of proceedings is ordered. To that rule we today have added that those procedures also apply to pretrial documents which otherwise would constitute public records.

I do not concur in the implication in the majority opinion that adverse pre-trial publicity really is not of much consequence and therefore, presumably, hardly any sealing order could be proper. Neither do I concur in the pure dictum, distilled from a selective quotation from *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1967), to the effect that "in a large metropolitan area such as Los Angeles, with its millions of potential jurors, it is unlikely that 'searching questioning of prospective jurors * * * ' and 'the use of emphatic and clear instructions * *' will fail to produce an unbiased jury, regardless of the nature of the pretrial documents filed." (Op. p. 1146). Such precatory conclusions do not comport with the real-life lessons of criminal trials or the actual experience of trial lawyers. Nor are such easy assertions bolstered by the majority's adoption of the Second Circuit's reassurance, in affirming one of the "Abscam" cases, *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980), that the intense publicity in those controversial cases has not left unsettled doubts and grave concern that violence was done to basic concepts of fair trial.

In fact, *Nebraska Press Ass'n* does not at all suggest that a defendant's constitutional right to fair trial may not be so damaged by reams of adverse publicity as to call for reversal of a conviction.

In the first place, that case did not involve sequestering of pretrial documents but concerned a blanket injunction against the press, forbidding publication of anything in the nature of an admission or confession by the defendant -- a classic prior restraint. In the second place, with respect to the potential impact of publicity, Chief Justice Burger's opinion reads:

Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this

case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only 'a clear and present danger that pre-trial publicity *could* impinge upon the defendant's right to a fair trial.'
Nebraska Press Ass'n v. Stuart, 427 U.S. at 562-563. (Emphasis in original).

And further in the opinion it is stated:
The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors.
Id. at 568-569.

Also, in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1978), Justice Blackmun, joined by Justices Brennan, White and Marshall, wrote:
At the same time, I do not deny that the publication of information learned in an open proceeding may harm irreparably, under certain circumstances, the ability of a defendant to obtain a fair trial. This is especially true in the context of a pretrial hearing, where disclosure of information, determination to be inadmissible at trial, may severely affect a defendant's rights. Although the Sixth Amendment's public-trial provision establishes a strong presumption in favor of open proceedings, it does not require that all proceedings be held in open court when to do so would deprive a defendant of a fair trial.
443 U.S. at 439. There is no doubt in the real world that pervasive adverse publicity can indeed contaminate the air for fair trial. No one can now say what persistent effect, if any, lurid publicity will have on the trial, even after months have passed. We have no occasion to dilute the teachings of history. Our function is to reason how there may be legitimate antidote against miscarriage of justice.

I am also concerned that the majority has not indicated how the trial judge should in its view go about making his "item-by-item" determination (Op. p. 1147) whether future documents, which he may have reason to believe meet the *Brooklier* guidelines, should be withheld. Nothing has been said about "in-camera inspection," a common practice and precisely the procedure that the court logically should follow. The press petitioners, quite without justification, I think, have insisted that it should not be permitted. They have argued that the press has some right to immediate inspection which cannot be held in abeyance while the trial judge looks to see whether withholding is necessary to protect the fair trial right or any other right may warrant withholding.

"Although the right of access to criminal trials is of constitutional stature, it is not absolute." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 2620 n. 17, 73 L. Ed. 2d 248 (1982); Brennan, J. for the Court, citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581, n.18, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (plurality opinion); citing also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570, 49 L. Ed. 2d 683, 96 S. Ct. 2791. The *Globe* court has made it crystal clear that neither the First Amendment nor the Sixth gives press, public or the defendant the right to look first, before the court has had an opportunity to judge the nature of questioned documents or

other matter. In *Globe*, a rape case, the court recognized the appropriateness of in-camera procedure for sensitive issues:

Of course, for a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.' * * * This does not mean, however, that for purposes of this inquiry the court cannot protect the minor victim by denying these representatives the opportunity to confront or cross-examine the victim, or by denying them access to sensitive details concerning the victim and the victim's future testimony. Such discretion is consistent with the traditional authority of trial judges to conduct in camera conferences. (Citation omitted). Without such trial court discretion, a state's interest in safeguarding the welfare of the minor victim determined in an individual case to merit some form of closure, would be defeated before it could ever be brought to bear.

Globe Newspaper Co., 457 U.S. 596, 102 S. Ct. at 2622, n.25.

In addition, there are numerous other alternatives to flatly closing or sealing. For example, the judge may consider partial excision of documents; may place "limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech," *Globe Newspaper Co., supra*, 102 S. Ct., at 2620 n. 17 (1982). I believe there exists ample authority for the court to admonish the attorneys and law enforcement officials connected with the case against gratuitous public statements -- in which both sides here have unfortunately engaged -- calculated to distort and confuse the issues in litigation. The defense often has self interest in abstaining from such activity, and the prosecution "is in a particular and very definite sense the servant of the law * * *" *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935).

Any careful reading of the cases demonstrates that the right of fair trial is companion, not servant, to the constitutional guarantee of public trial. A defendant's individual stake in it is to be protected every bit as much as that of other components of society and a district court has a duty to lend that protection, using its full panoply of available procedures. What we say today ought not be seen as disregarding the danger of adverse publicity but as reinforcing the equally important rights of public and press under the First Amendment. In short, in this area as in other aspects of the administration of justice, drawing the least restrictive line is an essential function of the judicial process.

I do not suggest that the majority has *intended* to denigrate the traditional discretion of the court to apply a considered and private analysis to documents whose public availability may be challenged. I do suggest that in its setting aside of the district court's order, some practical requirements of trial have not been fully considered. I am confident, however, that the district judge, whose conscientious efforts we have nevertheless found wanting, will understand that we do not deny that in proper circumstances he still retains the ultimate power to close or seal, faithful to the constitutional procedures we have now underscored, where he finds and articulates that lesser alternatives are inadequate. I am also confident that under our ruling, properly construed, district judges will continue to reach for fair balance of the sometimes conflicting interests which arise in the course of assuring fair and public trial.