



April 2, 2020

Via email: media@ao.uscourts.gov

James C. Duff
Director, Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: **Public Access to Courts and Records Amid COVID-19 Emergency**

Dear Director Duff,

I write on behalf of the First Amendment Coalition, a nonpartisan, nonprofit organization that advocates for government transparency, freedom of speech and freedom of the press, to urge the U.S. Administrative Office of the Courts to help ensure the public and press continue to have full access to criminal proceedings amid the COVID-19 emergency.

The courts are facing an unprecedented challenge. Your office can help ensure there is no interruption to public and press access by issuing clear and practical direction to court leaders.

There can be no mistake—public observation of judicial proceedings is essential. “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). As you know, the Judicial Conference of the United States has temporarily authorized video and teleconferencing for certain criminal proceedings and teleconferencing for civil proceedings (See this March 31 [public notice](#)).

Unclear, however, is how the public and press may access these and other proceedings, as they are entitled to do under the First Amendment. See, e.g., *Richmond Newspapers*, 448 U.S. 555 (presumptive First Amendment right of public access to criminal trials); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (right of access to jury selection in criminal trials); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)(criminal pretrial hearings); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (First Amendment right of access to civil proceedings and documents).¹

The Supreme Court has held the First Amendment protects the right of public access to court proceedings because “a major purpose of that Amendment was to protect the free discussion of governmental affairs,” and thus, the right of access is an essential part of the First Amendment’s guarantee to “ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

Thus, public and press access to court proceedings is at the core of the constellation of rights protected by the First Amendment and even in times of crisis—especially in times of crisis—must be protected. That is particularly true where, as here, the barriers to access are relatively minimal, i.e., technological.

We applaud the judiciary for working to protect the health of its workers and visitors and embracing the use of technology to conduct judicial proceedings remotely. Appeals courts are live-streaming oral arguments, and district judges are placing free dial-in information on their dockets so the public and press can observe civil proceedings.

As the Administrative Office of the Courts considers public and press access to video and telephonic criminal proceedings in light of Federal Rule of Criminal Procedure 53, it must be guided by principles of the First Amendment.

¹ Although the Supreme Court has not expressly held that the public and press have a First Amendment right to attend civil proceedings and access documents from such, that right has been broadly recognized by the Circuit Courts. See, e.g., *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 305 (2d Cir. 2011) (finding a right of access to administrative civil infraction hearings); *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) (“We hold that the First Amendment does secure a right of access to civil proceedings.”); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (finding a right of access to litigation committee reports in shareholder derivative suits); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm’n*, 710 F.2d 1165, 1177 (6th Cir. 1983) (holding that the First Amendment limits judicial discretion to seal documents in a civil case).

We make the following recommendations:

First, telephonic proceedings should be conducted on conference lines that provide free access for the public and press. Dial-in information must be readily available in advance of the proceeding.

Second, any proceeding taking place on video should be available in real-time at no cost to the public or press. Information on how to view the proceeding must be readily available in advance of the proceeding.

Third, court records should remain publicly available at no cost, as they are at public-access terminals at courthouses. When courthouses restrict access to those public-access terminals, the federal judiciary should waive fees charged on PACER, to ensure cost is not a barrier to access.

Thank you for your attention to this area of great public concern.

Sincerely,

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