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May 30, 2023

**E-MAIL**

Rep. Martin Lalonde, Chair  
Rep. Michael McCarthy, Vice Chair  
Special Committee on Impeachment Inquiry  
115 State Street  
Montpelier, VT 05633

Re: Vermont Press Association

Dear Rep. Lalonde and Rep. McCarthy:

One of the most important Constitutional issues that the General Assembly can decide is whether to impeach an independently elected official. Because of the nature of this responsibility, every step of the process should be open and transparent.

On behalf of the Vermont Press Association and its statewide membership, I am writing you today to please reconsider your decision to provide possible sweeping secrecy as your committee investigates if an impeachment proceeding should be undertaken. The Committee adopted its proposed secrecy rules without a chance for public comment at a hearing as requested by the VPA before your first meeting. Most of your adopted rules would never pass muster in Vermont courts. Witnesses, even child victims in sex crimes, testify in open court.

In a democracy, the public are the ultimate authority. The Vermont Constitution recognizes both the people's central role and the need of the General Assembly to conduct its business in the open. Our Constitution recognizes that the people are the ultimate holders of governmental power. Chapter I, Article 6 says: "That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them." The General Assembly can only be accountable to the people if the General Assembly's actions are public. There is not only a long tradition of requiring the General Assembly to conduct its business in the open, but the Constitution explicitly requires it. Chapter II, Section 8 says, "The doors of the House in which the General Assembly of this Commonwealth shall sit, shall be open for the admission of all persons who behave decently, except only when the welfare of the State may require them to be shut."

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The First Amendment of the United States Constitution also provides strong protection for open proceedings in criminal and civil court. In *Richmond Newspapers, Inc. v. Virginia*, the United States Supreme Court held that: “Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court.” 448 U.S. 555, 575 (1980). The Court recognized that “[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.” *Id.* Criminal trials are not private: “A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity.” *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-93 (1975) quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947).

The United States Supreme Court extended the holding of *Richmond Newspapers* to criminal pretrial proceedings in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986). The Court held that these proceedings could only be closed in narrow circumstances. *Id.* “Since a qualified First Amendment right of access attaches to preliminary hearings in California, the proceedings cannot be closed unless specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *Id.* at 13-14 (citations omitted). The interests of witnesses was one of the arguments in favor of closing the hearings that the Court rejected.

The First Amendment also extends that openness to civil judicial proceedings. “[I]t is well established that the public and the press have a ‘qualified First Amendment right to attend judicial proceedings and to access certain judicial documents.’” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (citation omitted); see also *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (qualified First Amendment right to docket sheets). “Judicial documents” include not just the opinion of the court, but documents that the court considers in reaching its decision. In *Lugosch*, the issue involved summary judgment briefing. 435 F.3d at 120-21. The Second Circuit held that the First Amendment right of access attached to those documents. “Our precedents indicate that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.” *Id.* at 121.

That reasons that the Committee has given to close its proceedings do not hold up to scrutiny. In our judicial system, witnesses are asked to testify routinely in criminal trials, civil trials, and various pre-trial proceedings. Rather than conceal testimony, the courts have long supported the use of cross examination to promote truthful testimony. Indeed, the Sixth

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Amendment of the United States Constitution guarantees the rights of a criminal defendant to confront his or her accuser(s).

Likewise, the concern for retaliation against witnesses is unfounded. Significant protections already exist under the law to protect witnesses from intimidation or retaliation. *See, e.g.*, 13 V.S.A. § 3015. If the General Assembly felt that these protections were insufficient, it could have and should have enacted stronger protections like a whistleblower protection law.

What is equally concerning is that the “Special Committee on Impeachment” is attempting to give itself limitless power to exclude the public and press based on vague and unreviewable bases. For example, the Committee is apparently giving itself the authority to make things secret when it is “otherwise necessary to enable the Special Committee to conduct its inquiries.” With respect, this savings clause grants the Committee an excessive amount of discretion to close its proceedings for little or no reason. Moreover, the Committee has no requirement to record the reasons for concealing witness testimony or its deliberations, effectively insulating itself from any sort of accountability for its investigatory conduct. Prosecutors in the judicial system are accountable to the Judiciary for their conduct even in the investigatory stage of a case.

We appreciate the Committee’s commitment that it “will conduct our work in open session whenever possible.” In addition, the press appreciate your commitment that “The Final Report of the Special Committee on Impeachment Inquiry will be available to the public. Any evidence presented to the House, in the event that Articles of Impeachment are recommended by the Special Committee, would also be public, as well as the testimony and evidence in any trial in the Senate.” However, that disclosure comes too late to ensure that the General Assembly is doing its job. The deliberations of the Committee and all evidence given to the Committee should be available for public review immediately.

Very truly yours,

GRAVEL & SHEA PC



Matthew B. Byrne

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cc: Lisa Loomis (e-mail)  
Michael Donoghue (e-mail)