

# Disappearing dockets

*When public dockets have holes, the public's right to open judicial proceedings is jeopardized.*

BY KIRSTEN B. MITCHELL  
AND SUSAN BURGESS

It was a novel defense by any stretch of the imagination: Julio, a.k.a. Pepe — he was known as both in the Colombian drug world — rebuffed an alleged deal that would have shaved time off his prison sentence if he paid \$30 million-plus to federal drug informants.

To help prove his case — and the alleged massive U.S. government conspiracy — Fabio Ochoa-Vasquez, as he is known to U.S. prosecutors, wanted access to court documents in the case of Colombian drug lord Nicolas Bergonzoli, who could testify firsthand about the government's alleged corruption scheme.

But there was a problem. Bergonzoli was prosecuted, convicted, sentenced and imprisoned in total secrecy, hampering Ochoa-Vasquez's trial preparation. Bergonzoli's case was so secret, it wasn't even listed as "SEALED." The case number — 99-00196-CR — was missing from the public docket at the federal courthouse.

The case simply didn't exist.

The U.S. District Court in Miami, where both men went on trial, isn't unique. During the past five years, 469 cases in U.S. District Court in Washington, D.C., have been prosecuted and tried in complete secrecy, with no public knowledge even of the cases' existence and no way for the public to challenge the secrecy.

The Reporters Committee for Freedom of the Press found the cases by searching the court's entire civil and criminal docket for the past five years. During the five-year period ending Dec. 30, an average of 18 percent of nearly 3,000 criminal cases were not docketed in Washington's U.S. District Court — one of 94 federal courts nationwide. Undocketed civil cases were so few — 65 of more than 12,000 — as to be statistically insignificant. (See chart, page 5)

Many, if not all, of the civil off-the-docket cases are believed to be whistle blower suits filed under the federal False Claims Act, which allows private citizens to sue on behalf of the U.S. government charging fraud by government contractors



AP PHOTO

**Former druglord Fabio Ochoa-Vasquez challenged the secrecy of other drug cases.**

and other entities receiving or using government money. By law, such *qui tam* suits are filed under seal for 60 days while the government decides whether to intervene in the case, allowing time to investigate the alleged wrongdoing without the company knowing. After two months, such suits may or may not appear on the docket.

Cases missing from the criminal docket are typically gang-related prosecutions that tend to culminate in multi-defendant drug and murder conspiracy trials, say court officials and lawyers with access to the cases who were interviewed for this story. Very few, if any, of the cases are terrorism related, they say.

The incomplete public dockets raise important public policy concerns about openness to court proceedings, an attribute of English and American trials for centuries.

Although neither the U.S. Supreme Court nor the U.S. Court of Appeals in Washington, D.C., has ruled on the issue, two federal appellate courts have ruled secret docketing unconstitutional.

## Off the docket v. sealed

Keeping cases off the docket — and off the public record — is different from sealing cases. The only way to determine the existence of off-the-docket cases is to scroll through public dockets searching for missing case numbers. (See "Finding hidden dockets," page 6)

Sealed cases are assigned case numbers that appear on the public docket. Some 12 percent of cases, the vast majority of them criminal, were listed as "SEALED" in U.S. District Court in Washington, D.C., according to a June 2005 search of the U.S. Party/Case Index, an electronic federal court records database. All of those "SEALED" cases were assigned public docket numbers, allowing the public to know that they exist.

"You must disclose that a case exists and is moving through the courts. If you don't do that, you can't have monitoring by the public, press, or different government agencies on what these cases are all about," said Dan Christensen, a reporter who broke the 2003 story of Mohamed K. Bellahouel, an Algerian-born U.S. resident detained secretly for five months after the

Sept. 11 attacks. Christensen, a former *Miami Daily Business Review* reporter now with *The Miami Herald*, spotted the case after its docket number disappeared from the public record. (Shrouded in secrecy, Bellahouel's case went all the way to the U.S. Supreme Court, which declined to hear the case in 2004.)

In Washington's federal district court, most off-the-docket criminal cases were kept off the public docket after prosecutors asked judges to seal the cases, according to those who handle such cases.

While Justice Department guidelines recognize a strong presumption against closing criminal proceedings and outline limited reasons allowing for closure, they don't specifically address nonpublic docketing.

Both the department's arguments for and the judge's approval of sealing an undocketed case are shielded from public view, making it impossible to know whether the guidelines are followed. What's more, the U.S. Attorney's Office in Washington does not monitor how many requests it makes to seal cases or how many requests are approved.

Prosecutors seek to seal cases in part to protect ongoing investigations by the government with an eye toward nabbing more criminals and keeping informants and witnesses alive, said Stevan E. Bunnell, chief of the Criminal Division at the U.S. Department of Justice.

Under the department's "Policy with Regard to Open Judicial Proceedings," requests to seal cases must be approved by a deputy attorney general, a sufficiently burdensome and time-consuming process that prosecutors are reluctant to do unless they really need to, Bunnell said.

The guidelines say that proceedings may be closed if failure to close them will produce "a substantial likelihood and im-

minent danger to the safety of parties, witnesses, or other persons."

In the nation's capital, "there are people who would be in serious danger, who would be killed, if it was known they cooperated with the government," said an official with the Office of the Federal Public Defender for the District of Columbia. "And all the stake holders in the situation understand that and so the case is sealed to protect the individual."

A former public defender who requested anonymity said "when a case is not even docketed, that presumably reflects a decision by a judge that the existence of a case on the docket — even without more identifying information — could be detrimental to the government's investigation or the safety of the defendant, although one may tend to view that rationale with skepticism from the perspective of the public's right to know."

In Washington, a 67-square-mile city sharply divided by income, education levels and race, the bulk of criminal investigations take place in a small geographic area, increasing the likelihood that cooperators will run into the people that they have informed on.

At one point, prosecutors noticed that criminals used public court records to spot cases in which nothing had happened since an arrest. The criminals, correctly concluding that defendants in such cases were cooperating, often retaliated by killing them, said an official with the U.S. Attorney's Office.

"In 30 years, I don't know how many gangs I've seen prosecuted. There's the K Street gang, the L Street gang, the M Street gang and on and on," said one court official who did not want to be named because he does not speak for the court. "I think there's a heightened concern by this court over the health and welfare of witnesses."

That plays out in the number of off-the-docket criminal cases, which has risen in recent years — from a low of 79 in 2003 to a high of 111 in 2005.

### The vault

How do off-the-docket cases end up in the secret vault?

All cases — public and secret — are randomly assigned to one of 21 federal judges in Washington and then sent by those judges to the clerk's office where clerks enter the cases into the docketing system. The judge will have specified any cases that are to be kept off the docket. Cases that are off the public docket are entered in a section of the docketing system closed to the public and even to some employees of the clerk's office. No note is made in the public docket that the cases even exist.

While Chief Judge Thomas F. Hogan does not approve non-docketed criminal cases, he does review civil cases that are not on the public docket, according to Sheldon Snook, administrative assistant to the chief judge and spokesman for the court.

Court officials say the judges follow the "Rules for the U.S. District Court in Washington, D.C.," in sealing cases, but the rules, like the rules prosecutors follow, provide no procedures for keeping cases off the public docket.

And judges who agree to seal cases or keep them off the docket do not justify their actions publicly through a public order weighing the public's right to know against the need for secrecy.

But Snook said judges are careful not to abuse their power to shield entire cases from the public.

"The judges here in Washington, they are sensitive to the whole issue of sealing cases," he said. "There's a presumption that the court's business should be done

### A summary of the docket listings in U.S. District Court in Washington, D.C.

Year	Criminal			Civil			Combined		
	Hidden	Docketed	Total	Hidden	Docketed	Total	Hidden	Docketed	Total
2001	84	383	467	13	2,686	2,699	97	3,069	3,166
2002	85	446	531	10	2,533	2,543	95	2,979	3,074
2003	79	488	567	11	2,651	2,662	90	3,139	3,229
2004	110	457	567	11	2,286	2,297	121	2,743	2,864
2005	111	349	460	20	2,463	2,483	131	2,812	2,943
TOTAL	469	2,123	2,592	65	12,619	12,684	534	14,742	15,276

Source: Compilation of data from U.S. District Court, Washington, D.C.

in public.”

All 21 U.S. District Court judges contacted by the Reporters Committee either did not return phone calls or declined to discuss secret docketing, referring all questions to Snook.

The federal district court’s rules outline a process in which “[a]ny news organization or other interested person, other than a party or a subpoenaed witness” can apply to the court for “relief relating to any aspect of the proceedings in a criminal case.” But, as Ochoa-Vasquez learned in defending his case, that is difficult or impossible when the only thing anyone knows about these cases is that they are not docketed.

Ochoa-Vasquez intervened in Bergonzoli’s case and succeeded in unsealing a few docket entries in that case, but he was able to do that only because a record in U.S. District Court in Connecticut, where the indictment was first filed, contained the post-transfer case number assigned by the U.S. District Court in Florida.

The court record now reflects that Bergonzoli cooperated with the government, entered a plea agreement, and, on Jan. 30, 2002, was sentenced to just over three years in prison. But many key documents in the case remain sealed to this day. Bergonzoli was never called to testify in Ochoa-Vasquez’s case.

In Washington, D.C., and many federal district courts nationwide, once off-the-docket cases have been entered on the secret docket, they don’t go onto rows and rows of shelves holding burgeoning case files. They go straight to a vault in the clerk’s office, shielded from the public and where few court employees have access.

### Courts weigh in

Secret dockets have been ruled unconstitutional in the Eleventh Circuit — covering federal district courts in Alabama, Georgia and Florida — and in the Second Circuit — covering Connecticut, New York and Vermont.

In Ochoa-Vasquez’s case, which was combined with Bergonzoli’s case on appeal, the U.S. Court of Appeals in Atlanta (11th Cir.) ruled in October that sealed dockets violate the First Amendment. Magistrate judges in Ochoa-Vasquez’s case had ordered transcripts and court orders related to a co-defendant not only sealed, but “held in the vault and not docketed,” according to the appellate court ruling. (See “A rare glimpse,” page 8)

Although the U.S. District had since moved those documents to the public docket and unsealed many other documents at issue in the case, the three-judge

appeals panel used its authority to weigh in on secret docketing.

Acknowledging that the issue was not properly before the court, “We nevertheless exercise our supervisory authority to remind the district court that it cannot employ secret docketing procedures that

we explicitly found unconstitutional” in *United States v. Valenti* in 1993. In that case, the court ruled that a dual docketing system, one public and one nonpublic, unconstitutionally infringed on the public and press’ right of access to criminal proceedings.

## Finding hidden dockets

Tracking missing cases in the federal courts isn’t difficult, it just takes time. And if you don’t do the work in the federal clerk’s office, it costs.

Either way, become familiar with the Case Management/Electronic Case Files, or CM/ECF, a Web-based case management system used by most federal bankruptcy and district courts. Some courts provide only civil case information on CM/ECF.

A handful of district courts are not yet using the system: the southern district of California, the southern district of Florida, Montana, Nevada, New Mexico, North Dakota, the eastern district of Oklahoma, and the western district of Texas. Reporters interested in those courts can still track missing cases by reviewing the dockets at the courthouse using the principles outlined here for electronic searches.

If you want to access CM/ECF without leaving your newsroom or home computer, you must register with PACER, or Public Access to Court Electronic Records. It’s free to register, but costs 8 cents per page to run reports, with a cap of \$2.40 per document.

For more information and to register, go to <http://pacer.psc.uscourts.gov/>. Accessing CM/ECF in the clerk’s office costs nothing — and it has the added advantage of clerks who can help navigate the computer system, which is user friendly.

Either way, go to the CM/ECF Web site for the court you are interested in. The site <http://www.uscourts.gov/allinks.html> provides links to all federal district and appellate courts.

Once you are on the court’s CM/ECF site, click on “Reports,” then choose either “Civil” or “Criminal.” For criminal cases, be sure to include all four types of defendants under “Case Flags”: “Pending, Terminated, Fugitive and Non-fugitive.” For civil cases, be sure to include both open and closed cases.

Choose an office — for example, White Plains or Foley Square, Manhat-

tan, for the southern district of New York — and highlight “Criminal” under “Case types.”

Then plug in the dates you are searching for and click on “Run Report.” (We searched month by month from Jan. 1, 2001, to Dec. 31, 2005.)

A report will come up with the docket numbers for the time period searched. The docket numbers are sequential by year. For example, the first criminal case of 2005 is listed as 1:05-cr-0001, the second as 1:05-cr-0002 and so on. The first several numbers are likely to be old cases that were reopened in the time frame searched.

Read through the reports, searching for missing docket numbers. Then, to double check that the dockets are indeed missing, click on “Query” and enter each of the missing docket numbers. If the case is missing, the computer will tell you “No such case” or “Not a valid case number.”

After we came up with 469 missing criminal cases and 65 missing civil cases over the five-year period, we presented the intake records clerk with a list of the missing docket numbers. He entered a dozen or so in his computer and confirmed that the cases were completely sealed from the public — and were being kept off the docket.

“The case you specified is SEALED and you are not authorized to see it,” the computer on clerk Mike Darby’s desk told him.

That’s because only certain docket clerks — Darby is not one of them — have access to the section of the computer system used for docketing hidden cases.

And where do the case files of these super-secret cases go? In D.C.’s District Court, they go to what everyone in the courthouse calls “the vault,” though they declined to elaborate.

— Kirsten B. Mitchell

*Melanie Marquez contributed research to this project.*

“[P]ublic docket sheets are essential to provide ‘meaningful access’ to criminal proceedings,” Judge B. Avant Edenfield, a visiting U.S. district judge from Savannah, Ga., wrote for the panel in *Ochoa-Vasquez*.

Dockets act “as both an index and a publication,” Edenfield wrote. “As an index, the docket catalogues all the proceedings and information taken before a court in that case. It permits both the court and observers to locate documents and proceedings that otherwise would be lost within the court’s vast record collections. It also allows one to quickly determine the status of a case, the actions of the parties, and the determinations of the judge, without requiring the inspection of every item in the case file. As a publication, the docket sheet provides the public and press with notice of case developments. This role assumes particular importance when the court is considering sealing a proceeding or judicial record.”

The Reporters Committee for Freedom of the Press submitted a friend-of-the-court brief in the *Ochoa-Vasquez* case but took no position on anything other than courtroom openness.

The appellate court, which noted the centuries-old history of open criminal proceedings in England and America, affirmed *Ochoa-Vasquez*’s conviction and sentence, ruling that he had not shown that he did not receive a fair trial because of the secret docketing or the court’s failure to articulate its reasons for sealing documents.

The entire appellate court denied rehearing the case in January.

In the *Valenti* case, the 11th Circuit case cited by the *Ochoa-Vasquez* panel, a different three-judge panel ruled that a dual docketing system used in U.S. District Court in Tampa violated the public’s First Amendment right of access to criminal proceedings by rendering it impossible for anyone to exercise that right. The public and the press had no knowledge that the case at issue — which involved conspiracy, extortion and bribery charges against a Florida defense attorney and an assistant state attorney — even existed.

Judge Joseph W. Hatchett wrote for a unanimous three-judge panel that the “maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings” and that the “dual-docketing system can effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences.”

The U.S. Court of Appeals in New York City (2nd Cir.) similarly ruled in 2004 that the press and public have a qualified First Amendment right to inspect docket sheets. Writing for a unanimous three-judge panel in *The Hartford Courant Co. v. Pellegrino*, Judge Robert A. Katzmann explained that “the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible.”

“[T]he docketing of a hearing on sealing provides effective notice to the public that it may occur,” Katzmann wrote.

Striking down the Connecticut state court’s secret docketing system, the panel

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*“[T]he maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings.”*

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reasoned that both history and logic support the finding of a presumptive First Amendment right to access court dockets. As early as the 1800s, the court explained, English dockets were open to the public, as demonstrated by the definition of the word “docket” in Thomas E. Tomlins’ “Law Dictionary” of 1809: “[w]hen rolls of judgments are brought into [Common Bench] they are docketed, and entered on the docket of that term; so that upon any occasion you may soon find out a judgment, by searching these dockets, if you know the attorney’s name.” And in the United States, the court noted, early legislatures passed state laws mandating the use of open docket books to permit public viewing and copying.

The public policy behind a First Amendment right to court proceedings supports an open docket system as well, the court said. “Precisely because docket sheets provide a map of the proceedings in the underlying cases, their availability greatly enhances the appearance of fairness. They have also been used to reveal potential judicial biases or conflicts of interest,” Katzmann wrote. “In addition, docket sheets furnish an ‘opportunity both for understanding the system in general and its workings in a particular case.’ By inspecting materials like docket sheets, the public can discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions,

information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed.”

Katzmann explicitly noted, however, that the presumptive openness of docket sheets could be rebutted “upon demonstration that suppression is essential to preserve higher values and is narrowly tailored to serve that interest.” For instance, if the government alleges an “extraordinary situation” where “‘an individual might be [put] at risk’ from public docketing, the district court may take steps to protect the privacy interests involved.” This did not mean, however, that courts could withhold all information about the case’s existence from the public docket, only that identifying information could be withheld if it was necessary to protect the privacy interests at stake.

The Reporters Committee also filed a friend-of-the-court brief in the *Courant* case.

### Changes

Under Connecticut’s old system of sealing, parties to cases could request that everything about the case be sealed and kept off the docket; that only the docket number but no other information be made public; or that both the docket number and parties’ names, but nothing else, be public.

Secret docketing no longer exists in Connecticut. The state’s Superior Court judges adopted new rules abolishing the use of secret dockets as a result of *The Hartford Courant* case and a subsequent legislative investigation, said Dan Klau, attorney for *The Connecticut Law Tribune*, one of the plaintiffs in the case. The rules incorporate the state high court’s standard for sealing cases, which dictates that a judge must give notice when he considers sealing something and an opportunity for the public to speak out against closure.

The judicial branch also added a section to its Web site listing all sealing motions on a court calendar.

Before the docketing procedures were revised, some Connecticut courts were keeping cases off the docket at the request of litigants because some judges incorrectly believed that keeping the case off the docket was a reasonable way to seal the case, Klau said.

“There was a real lack of understanding of the constitutional limitations when it comes to sealing files,” he said, “and as a result of the case, judges have a much more heightened awareness of the constitutional standards that must be met when you seal something.”

Sheryl Loesch, the clerk of court in

Florida's middle district — which covers a broad swath of central Florida from Jacksonville to Tampa, said that secret docketing also is a thing of the past in federal courthouses there. All cases, even those that are completely sealed, are on a public docket sheet, she said.

But an electronic search of the criminal docket for the U.S. District Court in Tampa found that between Oct. 20, when the 11th Circuit ruled in *Ochoa-Vasquez*, and Feb. 10, there were 11 of 175 criminal cases missing from the docket, suggesting that at least in Tampa, secret docketing continues. Court staff in the middle district explained that those docket numbers are assigned to sealed criminal cases that are stored in a vault until they become public. But it is unclear when — or if — those cases will be made public.

It also is unclear whether federal district courts in southern Florida have changed their practices. Clerk of Court Clarence Maddox did not return several telephone calls and e-mail messages, and it is impossible to run docket reports remotely because the state's Southern District does not yet use Case Management/Electronic Case Files, the Web-based case management system used by most federal bankruptcy and district courts.

"There's no way to know if there's been a change," said G. Richard Strafer, one of Ochoa-Vasquez's defense attorneys. "Most judges may be less inclined to go along with prosecutors' requests [for secret docketing], but how you ever know that — that's the problem with this."

Christensen shared Strafer's skepticism, recalling the coincidences that led him to uncover the secret docketing in southern Florida's federal district courts. "The nature of this is that you may never know that something is going on," he said. "There are cases going on in secret and you wouldn't even know to ask a question in the first place."

Ochoa-Vasquez's case illustrates several problems caused by undocketed cases, including defendants' inability to confront their accused when government cooperation programs shield the people who outed them and the public's inability to learn about allegations of corrupt government prosecutors, Strafer said.

The case, "was a perfect source of material for an investigative reporter to dig into — [but] it took years to unearth it all and since the revelations were so piecemeal, no reporters really got into it. The sealing helped prevent the public and the media from doing their job. There's a corrupt sentencing program that the government has admitted to — you'd think there

would be judges upset they'd been bamboozled by the government's own attorneys."

None of the federal courts' oversight agencies have dictated any rules regarding secret dockets for the nation's 94 federal courts. The Judicial Conference of the United States, a committee of federal judges who set policy for the federal courts, has never officially addressed the issue, said Bob Deyling, assistant general counsel at the Administrative Office of the U.S. Courts. The office, which does not monitor courts' docketing procedures, expects courts to administer their dockets independently.

Even if district courts tracked such data, they would not necessarily report on it, said David Sellers, the office's assistant director of public affairs.

And in Washington, D.C., the federal court's Rules Committee, a panel of lawyers that advises the court on its rules, has not dealt with secret docketing, Snook said.

### Once and forever

Once a case is off the public docket in U.S. District Court in Washington, D.C., it's likely to remain that way forever. In some cases, a judge may order a case sealed for a particular amount of time — say two years — unless the parties seek to keep it sealed longer. But in most cases, there's no such provision.

Even after defendants have served prison sentences, witnesses have died or informants have gone into witness protection, the court won't transfer a case to the public docket unless someone — prosecutors or an interested member of the public — petitions the court to do so.

"The court would not arbitrarily lift a seal without being asked," Snook said.

Nor does the D.C. U.S. Attorney's Office review cases it has requested be kept off the public docket. "From a cooperator's perspective, there's almost never a reason to unseal his or her case," said a former public defender. "Depending on the case, a cooperator may face potential danger both in prison and after he or she returns to the community. A defense lawyer in these circumstances has a duty to try to protect his or her client to the maximum extent possible."

That means that even after a case ends, the public remains completely in the dark about defendants prosecuted, tried and sentenced in a court system based for centuries on judicial openness. The cases, for all intents and purposes, simply do not exist. Stacey Sutton, an attorney who filed a brief on behalf of the American Civil Liberties Union in Ochoa-Vasquez's case,

is troubled by that.

"It's a bedrock of our constitutional system that courts are open to the public," she said. "That there are entire cases closed to the public is inherently adverse to our system." ♦

## A rare glimpse

An unusual firsthand look at secret docketing is buried in a footnote in an October ruling from the U.S. Court of Appeals in Atlanta (11th Cir.).

When Orlando Sanchez-Cristancho, a co-defendant in the U.S. government's "Operation Millennium" drug trafficking case, made an initial appearance in U.S. District Court in Miami, both the defense and prosecution asked Magistrate Judge Lurana Snow to seal the order and the transcript.

Snow agreed — and then directed that the records "be held in the vault and not docketed." In a unanimous ruling admonishing the lower court for its secret docketing procedures, the appeals court ruled that such a system was unconstitutional and footnoted the transcript of the discussion between the lawyers and Snow.

*The Court:* ... Anything else I've left out?

*Sanchez's counsel:* Judge, there's just —  
*Government:* There's the matter of docketing.

*Daniel Forman [defense attorney]:*  
There's just one other administrative matter.

*The Court:* My feeling is that you just work that out however you can. I don't know what to do with it, if you want to — me to defer, I guess I could verbally order that — that the clerk retain custody of these documents and that they be filed either on Wednesday or however [Magistrate] Judge Vitunac orders it, and that they be held in the vault and not docketed.

*Government:* That would work for us, Judge.

*Sanchez's counsel:* That works, your Honor.

*The Court:* ... So, I guess they can just put it in the vault —

*Government:* That's fine judge.

*The Court:* — without docketing.