Department of Justice

REMARKS

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TO

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I will speak to you today on the subject of open trials in criminal cases. There are at least four constitutional issues raised by this topic:

(1) do the First or Sixth Amendments provide a right to open criminal proceedings;

(2) to what criminal proceedings, if any, is attendance by the public constitutionally protected -- pretrial, acceptance of a plea of guilty, trial;

(3) what showing must be made by any party to sustain the closing of all or part of a criminal proceeding; and

(4) what governmental interests should be recognized as adequate to secure or resist the closure in particular cases?

I do not intend to speak definitively on each of these issues but rather to make a few observations which may be pertinent to the consideration of all of them.

I start from the proposition that public access to criminal trials is so necessary to the concept of due process, and so fundamental to the preservation of the fair administration of criminal justice generally, that the public (including the press) cannot be barred entirely from attending them. Justice William O. Douglas put it this way: "A secret trial would be an anathema to us. It would be unthinkable that in this country a person could be spirited

away, held incommunicado, tried in secret and executed. The advantages of a public trial over a secret one are obvious . . . the community would not have a good measure of the manner in which justice was administered if the public were excluded." Douglas, An Almanac of Liberty (1954.)

As Justice Douglas' statement suggests, the interests implicated by the public trial right are two-fold. The accused, of course, is protected from the abuse, or incompetence, that could flourish in secret. But the public also has strong interests in keeping trials open. These include education of the public about the criminal process; development of public confidence in its fairness; a guarantee against corrupt arrangements between prosecutors and defendants; a check on the competence of both the bench and bar; and the opportunity for contemporaneous criticism, debate, correction of error and ultimate reform.

The obvious importance of these interests, however, does not explain why I start with the proposition that the public may not be excluded entirely from a public trial. The explanation is simple: the costs of closing a trial, once imposed, are essentially not recoverable, while any actual damage resulting from openness, especially to a defendant, may be both guarded against and redressed on appeal.

The Supreme Court's decision last Term in Gannett Co., Inc. v. DePasquale has now cast doubt on the community's right to measure how its justice is administered. The doubt is created

not so much from the holding in the case, which is confined to the closure of a pretrial suppression hearing to avoid publicity prejudicial to the right to a fair and impartial jury, as from the confusion engendered by five separate opinions, four of which were written by Justices voting with the majority, and from certain language used in the majority opinion and the concurring opinion of Justice Rehnquist. The gravity of concern engendered by Gannett is legitimate, both because of the apparent numerical increase of closed trials conducted since the Gannett decision, and because of the centrality of the interests it implicates. The Supreme Court has now heard argument in another case, Richmond Newspapers, Inc. v. Virginia; its decision may do much to clarify the application of the Constitution to this issue.

By literal construction of the words of the Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ", the majority Gannett opinion and Justice Rehnquist's concurring opinion suggested that the right to enjoy the benefit of a public trial is the defendant's only; and further, that the effects of publicity on a trial may justify the closure of some proceedings as part of a trial judge's performance of his constitutional duty to safeguard the due process rights of the accused.

The majority's argument has the greatest force in the setting of a preliminary or pretrial proceeding. First, it is true that the Sixth Amendment literally states only that the accused has a right to a public trial, and the Court was able to cite numerous

historical examples of closures at stages of the criminal process short of the trial itself. Second, it is at such pretrial proceedings that the defendant's interest in closure may reach its zenith. The purpose of a suppression hearing, for example, is to insure that unreliable or illegally obtained evidence does not reach the jury. Yet, unrestrained publicity of such hearings could bring such inflammatory information to the attention of the general public and hence to potential jurors. Of course, this will not necessarily occur since there are alternative protective measures available to judges, but there may be circumstances where no alternative to pretrial closure exists.

The force of both these arguments, however, is lost when applied to the criminal trial itself. There, it is not enough to argue that since the language of the Sixth Amendment reads "the accused shall enjoy the right," the conclusion is compelled that a public trial may be eliminated by the consent of the accused with the approval of the court and government. It is not enough because of the common law's unbroken history of public trials unrestrained by any independent right of the defendant to compel closure, and because of the absence of any evidence that the Framers of the Constitution intended to do more than incorporate that historical tradition into the Sixth Amendment. And that reading is supported by a string of Supreme Court cases, prior to Gannett, holding that the Sixth Amendment implicates interests beyond the personal rights of the accused alone.

The interest of the Defendant in preventing publicity which may taint his trial is also at its nadir once the trial stage itself commences. At that stage, there are innumerable methods available to prevent prejudice and disadvantage to the accused. These include: sequestration of the jury to shield them from prejudicial publicity, as well as continuance, change of venue, intensive voir dire, preemptory challenges, exclusion of inadmissible evidence, limitations on the number, kind and nature of attendees, and admonitions and instructions to the jury.

It should be recognized that the right to access to a public trial is complementary to the essential rights and freedoms of the First Amendment, although that right is not dependent upon, nor need it rest upon, that Amendment. The right of the press and public to attend criminal trials permits the press to perform those of its important functions which are at the heart of the Amendment. As you are all aware, the Supreme Court has rejected the proposition that the First Amendment provides a basis for press access to government records or proceedings, perhaps because of a perceived difficulty in limiting the scope of such a right. Indeed, it is worth noting that even two of the four dissenters in Gannett were part of the Court's majority in the access cases. But a right of public access to criminal trials would not grant the press an independent right to obtain information otherwise unavailable to the general public. Nor would such a right be illimitable. Instead, reliance of the Sixth Amendment would both enshrine the values inherent in public criminal trials, and yet provide the Court with

a confined setting in which to formulate rules regarding a right of access.

The overriding importance of a constitutionally protected public criminal trial does not mean that every part of a trial, or all conduct during its course, must be open to total public scrutiny at all times. There are competing rights and interests of individuals to privacy and safety, and of the government to the confidentiality of sensitive or secret information, which must be weighed carefully.

In this difficult area one of the most difficult questions is what standard should govern the exclusion of the public from limited parts or pieces of a criminal trial. In the pretrial context of Gannett, the various opinions formulated a broad range of standards. Justice Stewart writing for the majority said: "A trial judge may surely take protective measures even when they are not strictly and inescapably necessary." Justice Blackmun, in dissent, posed a severe standard to be met by a closure motion, requiring a substantial probability that irreparable danger to a defendant's fair trial right would result from conducting the proceedings in public.

Part of the difficulty in formulating any standard is that there is no real measure of the depth and scope of the prejudice potentially resulting from a public disclosure. The common method of measuring public opinion, polling, is particularly useless here because of time restraints, costs, its fleeting and instant glimpse of opinion and because any poll is likely to

spread or reinforce some elements of the very prejudice sought to be measured.

Perhaps it would be useful to differentiate between pretrial publicity and other forms of prejudice. The greatest danger to be avoided in the former is to the right of the accused to a fair and impartial jury. A formulation fixed on that right would focus on timing, the size and scope of the jury pool and the degree and depth of publicity. This approach would be similar to that taken by the Supreme Court in those cases, such as Murphy v. Florida, where it reviewed defendants' claims that they were denied their right to trial by impartial jury because of prejudicial pre-trial publicity. The defendant at a minimum would have to show that a public proceeding would generate such publicity as to imperil substantially the selection of a fair and impartial jury, and further show both that closure will prevent the likelihood of that peril and that other, less restrictive methods of protection would not. Other risks posed by open proceedings, including threats to national security or personal safety, would have to be established by showing clear and convincing danger as well as by demonstrating the efficacy of closure and the inadequacy of all other methods of alleviating the danger or threat.

Because of the vital public interest in these issues and the dominant role of the Government in the criminal justice system, the Department of Justice is now undertaking to develop for the first time a written policy with regard to public trials and the standards to be applied to the closure of any part of a

trial. Given the well-established tradition and importance of open proceedings, there should be a strong presumption against closing pre-trial proceedings or portions of trials. The standard to be met to overcome this presumption cannot be so high as to be impractical nor so vague as to be useless. It should embody the principles I have discussed today and require a clear and convincing showing of a danger or threat posed to a legitimate right for which protection is sought. We shall seek public comment in the development of this policy and in the formulation of the standards and their applicability.