Department of Justice

ADDRESS

OF

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BEFORE THE

NATIONAL PRESS CLUB

MONDAY, FEBRUARY 11, 1980

12:30 P.M.

WASHINGTON, D.C.

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) does either the First or Sixth Amendment give rise to constitutional rights in this area;

(2) to what criminal proceedings does the Constitution apply -- 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 fundamental to the preservation of a fair trial and so necessary to the concept of due process 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).

Gannett Co., Inc. v. De Pasquale has cast doubt on the community's right to measure how its justice is administered. The doubt is created not 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. No, the doubt arises from the difficulty in understanding five separate opinions, four of which are from Justices voting with the majority and from the specific language used in the majority opinion and the concurring opinion of Justice Rehnquist. Four Justices have taken the unusual step of issuing post-decision comments because of their concern over the misunderstanding or misperception of the Gannett case. The gravity of concern about public criminal trials is legitimate, not because of the comparative numerical increase of closed trials conducted since the decision, but because the basic interests threatened are so important to our system of criminal justice. These interests include the education of the public in the criminal process; the

protection of all accused from abuse or incompetence; the development of public confidence in the fairness of the criminal process; the opportunity to bring forth evidence and the opportunity for contemporaneous criticism, debate, correction of error and ultimate reform.

By close 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 opinion and Justice Rehnquist's concurring opinion strongly suggest that the right to enjoy the benefit of a public trial is the defendant's only; and further that the publicity effects of a public trial conflict with the trial judge's constitutional duty to safeguard the due process rights of the accused to a fair trial.

In the setting of a preliminary or pretrial proceeding, the plain meaning construction, coupled with the prejudicial effect and conflict rationale, present their strongest argument. The Sixth Amendment says public trial and nothing else. Common law and the history of preliminary proceedings are both replete with closures at stages of the criminal process crucial to the defendant but short of a criminal trial itself. The very purpose of a preliminary or pretrial proceeding is to prepare in one way or the other for the criminal trial and frequently to determine the excludability of evidence from consideration of

a jury. The force of this argument is lost when applied to the criminal trial itself. There, the dispute of guilt or innocence is determined and the life or liberty of the accused is in jeopardy. The binding which joins the individual fragile rights of the accused in strength is contemporaneous public scrutiny.

Justice Stewart points out that the Sixth Amendment "... surrounds the criminal trial with guarantees, such as rights to notice, confrontation and compulsory process...", as well as the assistance of competent counsel for the defense, all of which rights are personal to the defendant and may be waived or foregone by him. But even so, are these individual rights to the accused exactly analogous to the public trial right?

Isn't the term "public trial" and its concept in the common law and the history of its use and practice in our country larger, more pervasive and more necessary to the protection and safety of all such personal rights and different from each one of them? When addressing the criminal trial, it is not enough to argue that since the language of the Sixth Amendment reads, "... the accused shall enjoy the right to a ... public trial ...", 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. Fair trial rights and the perception of justice in criminal trials cannot survive the dark of secret trials.

The common law, the uniform history of public access to criminal trials in the United States, the specific term "public trial" in the Sixth Amendment and the protection it affords to all fair trial rights serves to distinguish it from other personal rights of the accused and drives reason to the conclusion that a public trial in criminal cases is rooted in the Sixth Amendment concept of criminal justice.

The right of access to a public trial is complementary to the essential rights and freedoms of the First Amendment, although it is neither dependent on nor does it arise from it. The guarantee of a public trial to the public will ensure the right of the press to access to perform both the collection and dissemination functions important to a public criminal trial. But the right of access guaranteed under the public trial concept would not create an independent right under the First Amendment to secure or obtain information otherwise unavailable. All potential conflicts between a public trial and the individual rights of a defendant to a fair trial can be reasonably guaranteed by the innumerable methods available to prevent prejudice and disadvantage to the accused. The overriding importance of a constitutionally protected public criminal trial does not mean that every part of the trial or all conduct during its course must be open to total public scrutiny. There are competing rights and interests of individuals to privacy and safety and those of the government to the confidentiality of sensitive or secret

information, which must be weighed carefully. The available methods to prevent prejudice and disadvantage and yet consistent with the right of public access to a criminal trial include: continuance, change of venue, change of venire, intensive voir dire, preemptory challenges, sequestration, alternate jurors, exclusion of inadmissible evidence, proffers in camera, inspections in camera, limitation on number, kind and nature of attendees, protection of identities and admonitions and instructions to the jury.

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 two things: "A trial judge may surely take protective measures even when they are not strictly and inescapably necessary." He quoted from the trial judge, "the press and the public could be excluded ... because an open proceeding would pose a 'reasonable probability of prejudice to these defendants'." Justice Blackmun, in dissent, posed the severest standard to be met by a closure motion to the effect that there is a substantial probability that irreparable danger to his fair trial right will 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 to result or resulting from the public disclosure. The common method of measuring public opinion, polling, seems 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 with regard to standards to differentiate between pretrial publicity and other forms of prejudice in considering standards. The greatest danger to be avoided in the former is to the right of the accused to a fair and impartial jury. A formulation which fixes on that right would serve to focus on timing, the size and scope of the jury pool and the degree and depth of publicity. The defendant at a minimum would have to make a showing that a public proceeding likely would generate such publicity as to imperil substantially the selection of a fair and impartial jury, and further show that closure will prevent the likelihood of that peril and other alternative methods of protection would not.

Other forms of prejudice to privacy or safety or government interest in national security or confidential information posed by an open pretrial or disclosure at a public trial would have to be established by a showing of clear and convincing danger

or threat plus the two additions of 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 is 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 proceedings or portions of trials and the sealing of court records. 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 the danger or threat to a legitimate right to be protected. We shall seek public comment in the development of this policy and in the formulation of the standards and their applicability, particularly to public criminal proceedings.

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