Sixth Amendment - Public Trial

The right to a public trial is another ancient liberty that Americans have inherited from Anglo-Saxon jurisprudence. During the seventeenth century, when the English Court of Oyer and Terminer attempted to exclude members of the public from a criminal proceeding that the Crown had deemed to be sensitive, defendant John Lilburn successfully argued that immemorial usage and British **COMMON LAW** entitled him to a trial in open court where spectators are admitted. The Founding Fathers believed that public criminal proceedings would operate as a check against malevolent prosecutions, corrupt or malleable judges, and perjurious witnesses. The public nature of criminal proceedings also aids the fact-finding mission of the judiciary by encouraging citizens to come forward with relevant information, whether inculpatory or exculpatory.

Under the Public Trial Clause, friends and relatives of a defendant must be initially permitted to attend trial. However, the right to a public trial is not absolute, and parents, spouses, and children will be excluded if they disrupt the proceedings (*Cosentino v. Kelly,* 926 F. Supp. 391 [S.D.N.Y. 1996]). Toddlers and infants, ranging from one month to two years in age, may be summarily excluded from a courtroom consistent with the Sixth Amendment, even if the judge fails to articulate a reason for doing so (*United States v. Short,* 36 M.J. 802 [A.C.M.R. 1993]). Children in this age group are too young to understand legal proceedings, are easily agitated, and present a substantial risk of hindering a trial with distractions.

The Sixth Amendment right to a public trial is personal to the defendant and may not be asserted by the media or the public in general. However, both the public and media have a qualified **FIRST AMENDMENT** right to attend criminal proceedings. The First Amendment does not accommodate everyone who wants to attend a particular proceeding. Nor does the First Amendment require courts to televise any given legal proceeding. Oral arguments before the U.S. Supreme Court, for example, have never been televised.

Courtrooms are areas of finite space and limited seating in which judges diligently attempt to maintain decorum. In cases that generate tremendous public interest, courts sometimes create lottery systems that randomly assign citizens a seat in the courtroom for each day of trial. A separate lottery may be established for the purpose of determining which members of the media are permitted access to the courtroom on a given day, although local and national newspapers and television stations may be given a permanent courtroom seat. Members of the media and public who are excluded from attending trial on a given day are sometimes provided admission to an audio room where they can listen to the proceedings.

In rare cases, criminal proceedings will be closed to all members of the media and the public. However, a compelling reason must be offered before a court will follow this course. For example, when the First Amendment rights of the media to attend a criminal trial collide with a defendant's Sixth Amendment right to a fair trial, the defendant's Sixth Amendment right takes precedence, and the legal proceeding may be closed (*In re Globe Newspaper,* 729 F.2d 47 [1st Cir. 1984]).

Criminal proceedings also have been conducted in private when the complaining witness is a child who is young and immature and is being asked to testify about an emotionally charged issue such as **SEXUAL**

ABUSE (*Fayer-weather v. Moran*, 749 F. Supp. 43 [D.R.I. 1990]). If the court determines that only one stage of a legal proceeding will be jeopardized by the presence of the public or the media, then only that stage should be conducted in private (*Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 [1984]). For example, if a witness is expected to testify about classified government information or confidential trade secrets, the court may clear the courtroom for the duration of such tes timony, but no longer.

The right to a public trial extends to pretrial proceedings that are integral to the trial phase, such as jury selection and evidentiary hearings (*Rovinsky v. McKaskle*, 722 F.2d 197 [5th Cir. 1984]). Despite the strong constitutional preference for public criminal trials, both courts-martial and juvenile delinquency hearings typically are held in a closed session, even when they involve criminal wrongdoing. In all other proceedings, the defendant may waive his right to a public trial, in which case the entire criminal proceeding can be conducted in private.

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Case Closed?

Secret Trial is a Poor Departure from Precedent

FORUM COLUMN

By Henry Weinstein

On July 23, veteran Los Angeles federal Judge Stephen V. Wilson did something rare - he decided to hold a trial in secret.

Wilson's action raises significant First Amendment issues, as well as questions of just how much deference a judge should give to security concerns expressed by prison officials.

Closing a trial in the United States is highly unusual - even in cases involving terrorism where there was a possibility that government investigative techniques might come to light or in organized crime prosecutions where witness's lives might be endangered. For example, the trial of the individuals accused of the first World Trade Center bombing was held in public, as was that of the terrorists who blew up the U.S. embassy in Tanzania, as were those of dozens of Mafia figures.

In addition, numerous decisions of the U.S. Supreme Court and a bevy of federal appeals courts have long held that there is a strong presumption that trials - both civil and criminal - should be held in public.

Nonetheless, Wilson, acting in response to a government request, cleared the courtroom as testimony was about to begin in a wrongful death case filed by the widow of a Jewish Defense League activist who was murdered in a federal prison by a member of the Aryan Brotherhood.

Lola Krugel's suit asserted the Bureau of Prisons acted negligently by permitting David Frank Jennings to be housed in the general population at the federal prison in Phoenix. The Prison Bureau's action gave Jennings the opportunity to kill Krugel's husband, Earl Krugel, who was in prison for plotting the bombing of a Culver City mosque and the office of Darrell Issa, an Arab-American congressman, the suit alleged.

Jennings, a heavily tattooed white supremacist, used a loose cement block he picked up in the prison recreation yard to kill Krugel, striking his victim in the back of the head five times while Krugel was exercising. Last year, Jennings pleaded guilty to the November 2005 murder and a federal judge tacked on 35 years to the sentence the inmate already was serving.

After he closed the court last month, Wilson heard two days of testimony and then ruled against Lola Krugel. He also ordered that a transcript of the bench trial be sealed. Earlier in the case, Wilson closed one hearing, issued a protective order sealing a Prisons Bureau manual describing procedures for assessing which inmates had gang affiliations and were dangerous, and granted nearly two dozen requests of the U.S. attorney's office to file motions under seal. Wilson's court orders stated only that he was doing it "for good cause," with no further explanation.

Wilson, a 1985 appointee of President Reagan, has provided no detailed public explanation of his

ultimate ruling in the case or his decision to close the courtroom. Wilson's order states only that the trial was held in secret "due to the sensitive nature of the material."

After the trial concluded, Alex Porter, one of Wilson's law clerks, told The Daily Journal that "the sensitive information was inextricably intertwined with the rest of the testimony. There was no practical way, in our view, to make the proceedings open for part of the testimony and not for other parts."

Wilson's action, taken over the objection of Krugel's attorneys, has become an important issue for the journalistic community. In recent weeks, The Los Angeles Times, the Associated Press, the Reporters Committee for Freedom of the Press and the California Newspaper Publishers Association have filed papers seeking to have the transcript of the case made public.

"No compelling interest justifies the extraordinary secrecy of these proceedings, in which substantive pre-trial motions and trial materials were sealed, the entire trial was closed to the public and press, and even the government's brief responding to this Court's order concerning the unsealing of the trial transcript has been sealed in its entirety," according to the brief filed for the media organizations by Kelli Sager, Alonzo Wickers IV and Jeff Glasser of the Los Angeles office of Davis Wright Tremaine.

Wilson's decision to seal his final opinion in the case has made it "impossible for there to be any public scrutiny of the court proceedings or result," the Davis Wright lawyers added.

The media organizations are attempting to get the trial transcript unsealed, with the sole exception of documents relating to the identity of a confidential informant.

The media lawyers maintain it is particularly important to get the documents unsealed - including the government's criteria for identifying dangerous gang members - because the issue of whether the government adhered to its own criteria "goes to the heart" of Krugel's claims that the government acted irresponsibly.

"At its core, this case involved the issue of whether the government properly placed Mr. Jennings in the general prison population, and whether prison officials were negligent in failing to identify Mr. Jennings as a member of the Aryan Brotherhood, particularly in light of his tattoos. The public has a right to know ... why this Court apparently found after a secret trial that the government was not negligent," Sager and her colleagues wrote in an early August brief.

Krugel's attorneys, led by Benjamin Schonbrun, support the news organizations' efforts. But even if the transcripts are made public, considerable damage already has been done, the plaintiff's lawyers say.

"Unsealing the transcripts is not an adequate replacement for an open trial in which the public, including the press, would have been able to judge for themselves the conduct of the government in this case," according to a brief signed by Schonbrun, a partner with Schonbrun, DeSimone, Seplow, Harris & Hoffman. "Reading transcripts is no substitute for actually witnessing the live testimony of witnesses, especially when it comes to weighing their credibility," Schonbrun added.

In early August, Wilson granted the media organizations' request to formally intervene. At the time, he issued an order saying "the applicable standard [for sealing documents filed with the court] is akin to strict scrutiny, where the party seeking to keep information under seal must demonstrate a compelling interest, and the protective order must be narrowly tailored."

Subsequently, Assistant U.S. Attorney David Pinchas, the government's lawyer in the case, has

filed papers conceding that some of the records can be made public. In fact, on Aug. 13, he filed a brief saying the government "had never sought a blanket protective order or a closed trial in this case."

There is no way to assess the accuracy of this statement because numerous motions Pinchas filed under seal are not publicly available for review. However, Wilson's decision to close the trial, over the objections of Krugel's lawyers, strongly suggests the judge thought the government wanted potent protections.

Pinchas' current position is that the government sought to protect - and is still trying to protect - three things: identification of confidential informants due to safety concerns; a federal Bureau of Prisons policy that identifies the manner and techniques it uses to identify "Security Threat Groups" and "Disruptive Groups;" and the bureau's manual on such groups, a training guide that has discussion and examples of "the symbols, signs, codes and ciphers used by" these groups.

Pinchas also states that only a few pages of the 200-page manual were at issue in the case - three pages on the Aryan Brotherhood, a section on a Skinhead group and a section of acknowledgments. He contends there is no reason to even consider unsealing the rest of the manual because it was not at issue in the case.

Pinchas acknowledges there is a "societal interest in open proceedings." But he maintains that it is not absolute, and can be overcome by a "compelling government interest." In this instance, he contends public disclosure of information from the manual "would provide members of these dangerous groups with a blueprint for avoiding and circumventing efforts to identify them and track their activities while in prison."

But the media organizations maintain there already is a considerable amount of information about gang symbols, including those of the Aryan Brotherhood, easily available on the Internet. Sager attached some of this material to one of the briefs she filed. Moreover, she notes that portions of Wilson's 40-page ruling of June 18 dismissing part of Lola Krugel's case provided detailed discussion of procedures used by the Prisons Bureau in classifying inmates when they arrive at a particular facility.

Although the right of access to proceedings in a criminal case is more clearly established, there is no decision holding there is a presumption against access in a civil case. The leading U.S. Supreme Court decision on access came in the case of *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980), when a judge completely closed a murder trial to the public. The defendant was being prosecuted for the fourth time on the same charges after two mistrials and one reversed conviction.

The lead opinion by Chief Justice Warren Burger said that from the beginning of the Republic criminal trials were presumptively open. He quoted favorably the writings of English philosopher Jeremy Bentham who wrote early in the 19th century that open trials had more than a therapeutic value. "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." Burger also quoted a 1947 Supreme Court decision that said the court had not found "a single instance of a criminal trial conducted in camera in any state, federal or municipal court during the history of this country."

In a footnote, Burger said the *Richmond* case did not raise the issue of whether the public has a right to attend civil trials, but added, "we note that historically both civil and criminal trials have been presumptively open."

A decade ago, in *KNBC-TV Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999), a unanimous ruling upholding the public's right to be present during civil trials, the California Supreme Court said its

seven justices had "not found a single lower court case holding that generally there is no First Amendment right of access to civil proceedings." To buttress his opinion about the importance of open proceedings, Chief Justice Ronald George quoted a federal appeals court decision rejecting Brown & Williamson Tobacco Corp.'s efforts to keep a set of documents secret: "In either the civil or criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence and concealing corruption."

Clearly, the press does not have as great a right of access to prisons as it does to courtrooms. Many judges have afforded considerable deference to the entreaties of corrections officials and limited access to prisons.

Nonetheless, some federal judges have rejected claims by prison officials that security will be endangered if internal operating procedures are subject to scrutiny in open court hearings.

For example, in a civil class action involving the alleged unconstitutional overcrowding of Alabama prisons, the state attorney general's office asserted the proceeding should be closed. The prosecutors cited security concerns, while maintaining that the presumption of open criminal trials was not nearly so strong in civil cases. The 11th U.S. Circuit Court of Appeals spurned that argument in *Newman v. Graddick*, 696 F. 2d 796 (1983), ruling that "Civil trials which pertain to the release or incarceration of prisoners and the conditions of their confinement are presumptively open to the press and the public." Wilson is now reviewing the briefs submitted by the government, Krugel's lawyers, and attorneys for the media on the issue of unsealing transcripts of the trial and other material. As he is contemplating what to do, Wilson might want to consider the thoughts of another jurist appointed by Reagan in 1985 - Frank H. Easterbrook, a staunch conservative who is now chief judge of the U.S. 7th U.S. Circuit Court of Appeals in Chicago.

In a 2006 opinion castigating the issuance of a sealed decision in a trade secrets case, Easterbrook wrote: "What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification. The Supreme Court issues public opinions in all cases, even those said to involve state secrets. ... A district court issued public opinions in a case dealing with construction plans for hydrogen bombs. ... We hope never to encounter another sealed opinion."

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