ORIGINAL

In the

# Supreme Court of the United States

RICHMOND NEWSPAPERS, INC., ET AL.,

APPELLANTS

VS.

VIRGINIA, ET AL.

No. 79-243

Washington, D. C.
February 19, 1980

Pages 1 thru 56

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

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Washington, D. C.

Tuesday, February 19, 1980

The above-entitled matter came on for oral argument at 1:09 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States

WILLIAM J. BRENNAN, JR., ASSOCIATE Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAURENCE H. TRIBE, Cambridge, Mass., on behalf of Appellants.

J. MARSHALL COLEMAN, Atty. Gen. of Virginia, Richmond, on behalf of Virginia, et al.

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# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Richmond Newspapers, Incorporated, against Virginia.

Mr. Tribe, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. TRIBE: Mr. Chief Justice, and may it please the Court:

This is an appeal by the Richmond newspapers, and two of its reporters, who were expelled, along with all other members of the public, from an entire murder trial in September of 1978.

It was the fourth time that the defendant had been brought to trial for the murder of a local hotel manager. And his case had already been extensively described in the local press.

On motion of defense counsel, without objections by the prosecutor, the trial judge closed the entire trial on the authority of a Virginia statute which gives trial courts discretion to treat all observers as, and I quote the language of the statute, persons whose presence would impair the conduct of a fair trial.

At the end of a two-day secret trial, the trial judge excused the jury, declared the defendant not guilty of murder, and set him free.

On petitions for appeal--mandamus and prohibition--appellants sought to prevent their recurring exclusion from complete criminal trials by urging the Supreme Court of Virginia to hold such closure unconstitutional.

The State, in a memorandum and a brief, defended the closure on the express authority of the Virginia statute that had been invoked by the trial judge. And the Virginia Supreme Court summarily upheld the closure, citing only this Court's one-week-old decision in Gannett.

Although the Virginia statute and the Attorney General of Virginia speak in terms of fair trial in this case, there was no specific risk of unfairness whatever, either demonstrated or found below.

The problems that were noted, either by defense counsel or by the trial court, were three types. First, there were suggestions, which appellants submit are incompatible with the concept of public trial. For example, the trial judge's comment that the courtroom layout might make observers distracting since jurors could see them; a courtroom which for some two and one-half centuries had been used for open criminal trials.

Second, there were suggested difficulties that closing the trial simply could not have solved. I have in mind here defense counsel's concern that one or more of the prior trials had in some way been spoiled by inadmissible

evidence, or by jury exposure to pretrial publicity.

QUESTION: Was this trial held in the same courtroom as the prior trials?

MR. TRIBE: It was, Mr. Chief Justice. It was held under the same judge as the second and third trials, but a different judge than the one who presided over the first. It was only the first trial that went to judgment, a judgment of conviction that was ultimately reversed.

QUESTION: Where is Hanover County?

MR. TRIBE: It's some miles from Richmond, and it's a rural county. One of the points, indeed, made by the Attorney General is that because it's a small community problems of prejudicial publicity might be greater.

QUESTION: Well, some--that's like, most places are some miles--

MR. TRIBE: I'm afraid I have not been in Hanover County, Mr. Justice.

Finally, there were suggestions of problems that could obviously have been solved by devices that were far less restrictive than closure.

Defense counsel expressed particular fear that jurors might receive misleading or prejudicial information of some kind between trial sessions. There was no suggestion that jurors could not possibly be insulated during a trial, especially of this brief duration, from persons who might

give them prejudicial or misleading information.

Now, if this record justifies the closure of an entire murder trial, then frankly, it's rather hard to imagine one that would not.

The basic question that is therefore presented is, whether complete criminal trials can be held in secret, simply because defense counsel has moved for closure, and the prosecution has not objected.

That is what the statute in this case authorized.

QUESTION: Well, I thought the court had to decide.

MR. TRIBE: It's in the court's discretion, that's right. And the question is whether that discretion can be conferred upon a trial court to close the trial simply for that reason, on a record like this which shows no special risk of unfairness.

And I think it's important to stress what questions are not involved here--

QUESTION: It's not automatically closed, is it?

MR. TRIBE: No, not automatically closed, Mr. Justice.

QUESTION: If the defendant asks that it be closed, and the prosecutor doesn't object.

MR. TRIBE: No; the trial judge still has discretion to decide. But indeed, when we move to the First Amendment,

I think that will be an important part of the argument.

But it is a discretionary decision by an agent of government whether there shall or shall not be public awareness of what goes on in this trial.

The question, then, is whether the whole trial can be closed; not whether disorderly observers can be expelled; not whether witnesses can be asked to leave while other witnesses are testifying; not whether a particular portion of the trial can be closed; not whether certain members of the public can be excluded.

The question is really a rather wholesale one, and it's in that posture that the case reaches this Court.

Now, because the Court postponed consideration of jurisdiction to the hearing on the merits, I want to begin by addressing this question of whether this case is properly here under 1257(2).

As Chief Justice Marshall said in the Blackbird Creek case in 1829, it might have been safer, it might have avoided any question respecting jurisdiction, to have stated in terms that the act was repugnant to the constitution.

Surely it would have been safer here not to have omitted that statement. It is true that the appellants below never said, in so many words, this statute violates the constitution. But the question before this Court is whether the constitutional validity of that statute was drawn in

question, and whether the decision was in favor of its validity. And we submit that the answers to both of those questions is yes.

The trial court cited only this statute as authority. The court said the statute specifically authorizes the closure of a trial.

So this is not a case where there is merely a general authorizing statute, like one conferring jurisdiction to regulate, or jurisdiction to tax, which is somehow gratuitously dragged in by hindsight. This is a case where the statute by its terms bears the infirmity that concerns us here.

Nor did the State claim in the Virginia Supreme Court that the action of the trial court was somehow a lawless aberration. In the court below, as in this Court, the State says that the closure was lawful.

And indeed, in the Virginia Supreme Court, in defending its legality, both the prosecution's brief opposing appeal and the Attorney General's memorandum, opposing mandamus and prohibition, defended the legality of closure under State law solely as an exercise of authority which was literally conferred by the statute. It defended the statute--

QUESTION: We have appellant jurisdiction, whether the statute is invalid on its face or whether it's invalid as

applied, do we not?

MR. TRIBE: I think in this case, invalidity as construed and as enforced, is all that we claim, Mr. Justice. That's enough. That's certainly enough. And we're not claiming that every possible interpretation or application would be void.

But the statute was defended in the trial--in the court below as construing, broadly enough to uphold this closure, on the ground that it was a needed limit to the quote public's right to know, unquote.

And even in this Court, the Attorney General is not, as we understand it, disavowing this broad reading of the statute, or his defense of its constitutional validity when read this broadly.

QUESTION: Going to the matter of breadth, Mr. Tribe, tell me whether I correctly gathered from what you said before, that you're not arguing that never under any circumstances or conditions can a part of a trial be closed?

MR. TRIBE: That's correct, Mr. Chief Justice; a part of a trial. We are arguing that at least thus far we have been unable to imagine any circumstances in which an entire criminal trial can be closed.

QUESTION: Well, can you imagine circumstances in which a total public audience of 40 can be seated and a

hundred others want to get in, but they would have to stand around the edges. And the trial judge says, "Those who can be seated, be seated. But we're not going to have standing."

MR. TRIBE: Certainly, Mr. Justice. Indeed, one of the earliest proceedings in this courtroom, one in which Patrick Henry delivered an impassioned plea against the tyranny of the King, was rather of that kind. There wasn't room for all the people who wanted to attend; some were asked to leave.

But those who could be seated, and could remain orderly, were allowed to remain.

In this case, however oderly the observers, all were told to leave. The suggestion, as I gather it, by the Attorney General is, it would have been nice if the Supreme Court of Virginia had been given an opportunity to narrow the statute down somehow, and that it would have been given a better opportunity to do that, had we brought it into question instead of them.

But it's I think inconceivable that it would have made any difference. No particular narrow reading was suggested by the Attorney General. The Attorney General's position is: This statute authorized this closure.

And it would have been a rather pointless act for the Supreme Court of Virginia to say this closure was okay, but the statute is not broad enough to sustain it. We

sustain it under some other kind of common law authority.

That would have made enactment of the statute a pointless legislative exercise on the part of the Virginia legislature. So nothing really could have turned in this case on the form in which the validity of the statute was read.

It was necessarily, therefore, upheld by the Supreme Court of Virginia, when the Court denied appeal, mandamus and prohibition. And even with that not true, the case would clearly be here on certiorari. So let me then turn to the merits.

The Virginia Supreme Court upheld this trial closure and denied relief against recurring trial closures, citing only this Court's decision in Gannett.

I must say, that seems a baffling conclusion. Because of course Gannett involved a pretrial suppression hearing. No amount of dictum about trials would have permitted the decision in Gannett to resolve an issue that was not before this Court.

The majority opinion twice described the question presented as one about pretrial suppression proceedings only. And the concluding statement of the holding was equally narrow. As the Chief Justice observed in his concurring opinion, that made all the difference.

And the reason that I would submit it must make a

very great deal of difference is, implicit in the purposes and the character and the available alternatives in the two different settings.

Ultimately, the purposes of a pretrial suppression hearing are to keep inadmissible information from the jury, as a cross-section of the public. In contrast, the purpose of the trial itself is to expose admissible information to the jury as a cross-section of the public.

As a result, the character of the pre-trial proceeding is almost that of an internal governmental mechanism, whereas the character of the trial in chief is the very opposite.

Finally, there are difficulties, inescapably, about minimizing prejudice arising out of the airing of potentially inadmissible information at a pretrial hearing. There are devices available, and this Court has spoken of them in many cases. Sequestration is not available because the jury isn't chosen yet. But there are devices available: Changing venue; screening jurors through questioning. But the difficulty is that they are of uncertain efficacy, and if one must err on the side of fair trial, it seems to follow for some that the public may be excluded as a mechanism.

But the tension between publicity and fairness ceases when the trial begins. As this Court pointed out in

the Gannett opinion, a panoply of devices is then available, including suquestring the jury, in order to avoid any form of prejudicial information from reaching the jury.

So that all of the general references to the central role of fairness in our system in the Attorney General's brief, I submit, are beside the point.

We're devoted to fair trial. But fair trial does not require closed trial, given the devices that are available.

Now, even if there were no sharp dichotomies, no basic distinction between pretrial suppression hearings on the one hand and the trial on the other; even if one viewed them all as part of the same proceeding, I think it's also striking that a majority of the members of this Court in Gannett agreed, though on differing theories, agreed at least that there must be a substantial showing of need before either a trial or a pretrial proceeding can be closed. And on this record there was no substantial showing of need.

So without even drawing a distinction between pretrial suppression hearings and trials in chief, this Court--

QUESTION: Do you think the burden is heavier on the trial than--

MR. TRIBE: I should think it would be very much heavier, Mr. Chief Justice. Because at trial, presumptively,

the purpose is public; the mechanisms are available; the tradition is more clearly fixed. There's really no reason to extend the reasoning about pretrial.

But even if one did, I think the conclusion would be the same: This kind of closure would not be allowed.

QUESTION: Well, now, Mr. Tribe, you would agree I suppose that the statute did authorize a trial judge in this case to do precisely what he did?

MR. TRIBE: Yes, we think he probably did.

QUESTION: And therefore your claim is that the statute, at least as applied in this case, is--violates the United States Constitution\

MR. TRIBE: Exactly.

QUESTION: And I--it's not clear to me in what you're now telling us just what provision of the constitution it violates as applied in this case.

MR. TRIBE: Well, I think that it violates the Sixth Amendment and the First and the Fourteenth Amendment.

QUESTION: Well, the Sixth Amendment was--claim was disposed of in the Gannett case, was it not?

MR. TRIBE: Well, the Sixth Amendment claim as to pretrial proceedings, Mr. Justice.

QUESTION: Well, the Sixth Amendment talks about in all criminal prosecutions.

MR. TRIBE: That's correct. The accused--

QUESTION: Insofar as there was reliance by the petitioners--or the appellants, whoever they were--in the Gannett case, the Sixth Amendment claim was disposed of.

MR. TRIBE: I believe that the Sixth Amendment has not yet been held applicable at all by this Court to pretrial proceedings.

QUESTION: Well, the Sixth Amendment by its own terms talks about all criminal prosecutions; does it not?

MR. TRIBE: Yes, it does. But I don't think the question of whether in the trial phase of a criminal prosecution, persons other than the accused may have standing to invoke the Sixth Amendment, was disposed of in Gannett.

And the reason I don't think that question was definitively resolved in Gannett is twofold: first, inasmuch as this Court has not yet held that even the accused has a right, before the criminal prosecution begins, to insist upon publicity. The question of whether the prosecution is deemed to have begun at the pretrial suppression hearing stage, for this purpose, really hasn't been resolved.

So perhaps all that's been held in that respect is that where the Sixth Amendment doesn't apply at all, it doesn't confer rights on the public.

QUESTION: So you say most of the opinion was dictum, then?

MR. TRIBE: I'm afraid a good bit of it.

QUESTION: Well, there was reliance in the Gannett case on the Sixth Amendment.

MR. TRIBE: That's correct, Mr. Justice.

QUESTION: And that argument was rejected.

MR. TRIBE: As to pretrial suppression hearings.

QUESTION: Well, the Sixth Amendment talks about all criminal prosecutions. And in all criminal prosecutions the Sixth Amendment confers certain rights upon the accused: The right to a jury trial; the right to a speedy trial; and the right to a public trial--

MR. TRIBE: And as to the--

QUESTION: --upon the accused.

MR. TRIBE: That's correct.

QUESTION: And that therefore, as the Gannett case I thought said, just--that the Sixth Amendment self-evidently applies only to criminal cases, and confers rights only upon the accused.

MR. TRIBE: Mr. Justice, you are surely the authority on what Gannett said and meant. And all I mean to be suggesting, as a reader of the opinion, all I mean to be suggesting is that some question in my mind is left open about whether in the context of a complete trial this court's opinion in Gannett truly disposed of the issue.

The literal language of the Sixth Amendment was not quite enough. The Court surely looked to the purpose

of the Amendment--the opinion would have been a good bit shorter had the linguistics been dispositive.

QUESTION: Well, the opinion might have been a good deal shorter had there not been a dissenting opinion, too.

MR. TRIBE: Well, I'm sure that's so.

QUESTION: Mr. Tribe, may I just pursue this thought for a little bit further on. The Sixth Amendment issue only--and you draw a sharp distinction between pretrial and trial--is there any suggestion in any of our cases that a pretrial suppression hearing should be closed over the objection of the accused?

MR. TRIBE: I found no suggestion in this Court's cases either way on that issue.

QUESTION: You don't suggest that we would so hold, do you?

MR. TRIBE: I really don't know. Mr. Justice Blackmun in dissent suggested that that was what he inferred from the majority opinion. A number of--only one--

QUESTION: Well, what one word in the majority opinion lends support to that notion?

QUESTION: Or a sentence.

QUESTION: Not a single word.

QUESTION: Not a word.

MR. TRIBE: I certainly don't press it. It seems

to me--

QUESTION: I understand your distinction in First Amendment terms. But I'm not quite sure, if you followed the reasoning of the majority opinion, why you draw a distinction between pretrial and trial?

MR. TRIBE: Well the reason I would--

QUESTION: Insofar as it relates to the Sixth Amendment.

MR. TRIBE: I understand. The reason I would, briefly, is that the Sixth Amendment's central purpose, surely, is protecting the accused. He might be compromised were there a Sixth Amendment right on the part of the public to demand access. Because the very hearing on that question would involve the ventilation of information which could defeat the whole point.

At trial, creating an analogous enforceable right on the part of the public would not involve the inevitable compromise of the right at stake.

QUESTION: Well, when you say a trial, Mr. Tribe, I take it you exclude side bar conferences, chambers discussion as to suppression--

MR. TRIBE: That's right.

QUESTION: --that arise during trial. You're talking about reception of testimony from witnesses before a jury?

MR. TRIBE: Reception of evidence intended to be received by the jury.

QUESTION: Mr. Tribe, surely, did you rely--I know you rely here, and I assume you relied in the Virginia courts, on the First Amendment as well.

MR. TRIBE: I'm about to turn to that.

QUESTION: Well, I hope you will.

MR. TRIBE: Because I think it's a stronger argument.

QUESTION: Well, yes.

MR. TRIBE: The First Amendment, even if one reads the Sixth Amendment as completely inapplicable and conferring no rights whatever on the public, it sheds an important light on the First Amendment claim.

Under the First Amendment, it's of course established that more than simply speaking and protected; watching and listening may be protected as well.

It is also, I think, quite clear that the First Amendment is not a sunshine law; that material in the unilateral control of gvernment, generated by government, internal to government deliberation, is not automatically accessible to people who invokve the First Amendment and use the slogan of a right to know.

QUESTION: Now, are your clients the general public, or are they members of the press?

MR. TRIBE: The clients are two reporters and a newspaper. They were expelled, however, as an indiscriminate sweep of the general public.

QUESTION: But they're not the general public; they're specific members of the press, are they not?

MR. TRIBE: Of the press, and at the same time, they are citizens and members of the public.

QUESTION: Well, certainly; so are you, so am I.

MR. TRIBE: Correct. But I am not--I'm making nothing special of their status as members of the press. That is, were these two reporters not members of the press they would have been expelled just the same, and we would still be here arguing that the closure--

QUESTION: But you might not have the same case.

MR. TRIBE: I think we'd have the same First Amendment argument. The First Amendment argument that--I would be rather distressed about a principle that says that only members of the press--

QUESTION: Well, are you distressed about the First Amendment, which gives separate and specific protection to the press?

MR. TRIBE: No. I think it's important that--

QUESTION: It's there in the First Amendment, whether we like it or not.

MR. TRIBE: And I think it's terrific. But the

point that I'm making is that even without relying on the separate institutional status of the press--and without making any claim that the press has greater rights, the First Amendment is violated when government exercises the kind of power that was exercised here.

Now let me describe that power. I think it's plain that the accused did not have a right to a private proceeding; that is, the accused could not demand that it be private.

QUESTION: That, too, was held in Gannett, was it not?

MR. TRIBE: That's right.

Since that--

QUESTION: Mr. Tribe, if you had a professor at the law school nearby who wanted to come to listen so that he could lecture on the subject--

MR. TRIBE: Into this Court?

QUESTION: No, not this one, the Hanover Court.

MR. TRIBE: Ah-hah.

QUESTION: And would he then have a nexus with the First Amendment rights about speech, if he was going to make this lecture, based on what he observed?

MR. TRIBE: I don't think that inquiry into the way the information will be used is either necessary or--

QUESTION: I'm just pursuing--

MR. TRIBE: I think he certainly would.

QUESTION: I'm just pursuing--

MR. TRIBE: Even though he's not a member of the press.

QUESTION: --that was suggested, is there any difference to whether the man's going to use the information to write something or to go out and make a speech about it?

MR. TRIBE: No.

QUESTION: If he's just going to maintain silence.

MR. TRIBE: Or if he's simply going to educate himself with it, and use it to be a more intelligent voter on all kinds of matters.

The kind of power that was exercised here, given that the accused doesn't have the right to make it a closed proceeding, but only the option to request that it be closed, is a governmental power to decide.

Within the class of cases where the defense requests closure, which shall be available to public knowledge, and which shall not?

Now, it's at that stage that the Sixth Amendment assumes a role in the First Amendment argument. Because it is by virtue of the Sixth Amendment that this proceeding cannot be described as an in-total governmental proceeding. Neither is it private, nor is it internal government.

Because at least it is clear that the accused

could deman that it be open to the public. Because that is clear, it follows that asserting a First Amendment right of access here in no way commits the Court to transforming the First Amendment into a Sunshine law.

Those areas of documents, deliberations, buildings that are not, by virtue of the constitution, accessible to the public at least on the demand of someone outside of government's control--

QUESTION: Well, what--you talk about the First Amendment, Mr. Tribe. But I don't suppose it's just a crowbar. Is there some--could there be some showing that would permit the closing or not? Under your First Amendment standards?

MR. TRIBE: Well, under the First Amendment standards that I think appropriate in this case, a showing of some compelling need, which could be served only by the closure of a trial; and without which, some equally transcendent value would be compromised; would suffice.

QUESTION: Well, at least it wasn't here.

MR. TRIBE: One isn't even close to the line here, and it's for that reason that attempting to articulate the precise circumstances on a record of this kind--

QUESTION: Well, I don't want to get you into too much trouble, but what about Gannett?

MR. TRIBE: Gannett itself? I find on reflection

that that was a very--to me a very close case--

QUESTION: On the First Amendment.

MR. TRIBE: I think on--

QUESTION: On the First Amendment.

MR. TRIBE: On the First Amendment grounds, I think I would have to think that Gannett ought to have been opened. But I must say--

QUESTION: You think it was close? Do you think it was close?

MR. TRIBE: I think it was close. But I don't think this case is close, and this is the case that I'm arguing to that.

QUESTION: Do we know--have we any way of knowing very much about the closeness of it in the absence of any findings--

MR. TRIBE: Well, it's precisely the absence of findings that makes it--that aggravates the clarity of the case. One of the obligations, surely, given the First Amendment rights, would be to establish some basis in the record for the supposition that fairness was at risk, and could be saved only by closure.

Under this Court's First Amendment decisions one does not resolve that kind of doubt on a silent record in favor of suppressing the flow of information.

QUESTION: Well, supposing you have a defendant

who waives the right to a public trial; he wants a closed trial.

MR. TRIBE: As this one did.

QUESTION: As this one did.

Then what happens to your First Amendment argument? It's really just a kind of a tailgate kind of thing.

MR. TRIBE: I don't think so, Mr. Justice. Because when he waves it, that doesn't transform the august proceeding of a criminal trial into some kind of internal negotiation. It's not plea bargaining with here. It's the formal confrontation of the State with the accused.

The fact that he waived it then puts to the government the question, does the government want the people, or not, to see what's going on? And it was the government's decision ultimately to close this trial. That decision was triggered by the accused's request?

QUESTION: It may be the government's decision in almost every case that closes a trial.

MR. TRIBE: But if you're dealing with a context which is truly internal to government, in which government has unilateral control to begin with, then the First Amendment is far harder to apply. Because at that point you don't have the government exercising control over the flow of information, which is in the public domain.

This information was of that character by the

express command of the Sixth Amendment, even if you read the Sixth Amendment narrowly.

QUESTION: But it's not in the public domain if the defendant seeks--waives his right to a public trial?

MR. TRIBE: I guess that is the very ultimate issue in this case. How do you characterize it when the defendant has waived it? We would characterize it as still public, and we would do so, partly because without it a fundamental cornerstone of the constitution, among its most basic tacit postulates, would be compromise.

And we think--

QUESTION: Well, that's true about a jury trial, isn't it? Do you think that the public or the--has any right at all to insist upon a jury trial? Although that's certainly a fundamental postulate of the administration of justice in our country.

MR. TRIBE: But it's purpose--

QUESTION: If the defendant waives it, and the prosecutor agrees.

MR. TRIBE: It's quite true that the public can't insist that there be a jury trial. But the First Amendment--

QUESTION: Which members of the press might like to do so some times.

MR. TRIBE: But the First Amendment values would

not be implicated in that case. That is, the First Amendment that gives members of the public who want to know what is going on a special kind of interest, not just the generalized interest that everyone might have in seeing some of the Constitutional norms uniformly applied.

QUESTION: Mr. Tribe, I suppose there might be a legitimate or at least arguable, colorable First Amendment right to a jury trial by contrast to a defendant who just gets up there and says one sentence, "I plead guilty, Your Honor", and that deprives the press and the public of all the information about all the otherwise available evidence about those facts and circumstances of the criminal offense.

MR. TRIBE: But I think to transform the fact that there is less information around into a First Amendment claim is to go much further than we are doing here.

QUESTION: It is to go further but I wouldn't go with you that there is no colorable First Amendment claim.

MR. TRIBE: I suppose it's a question of how generous one is with the word "colorable".

Let me reserve a small amount of time, if I might.

CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF ATTORNEY GENERAL

J. MARSHALL COLEMAN

ON BEHALF OF RESPONDENTS

ATTORNEY GENERAL COLEMAN: Mr. Chief Justice, and if it may please the Court:

Your Honor, the Appellants take the position in this case that the Bill of Rights is for the public, but I think their argument ignores the one person at whom most of the Bill of Rights is aimed, John Paul Stevenson.

Now, there are two broad claims that can be made: One is the trial court could never be closed and the other is the trial courts can be closed without a hearing and without a hearing or without any reason or opportunity for the public to protest and argue against it.

It seems to me that in this case that the second argument is never reached because this is the first case, in my knowledge in Virginia, where a criminal proceeding has been closed in the guise of a full trial. There is a tradition that exists that is inviolate and as long as I am Attorney General I am sure it will be continued that the judge in this case was concerned and confronted with several difficulties. Here were very unusual and narrow facts. Someone who had been tried four times.

On the first occasion, the trial had gone up to the Supreme Court on appeal and because a bloody shirt had been introduced on the basis of hearsay evidence, the case

was sent back for retrial.

There was a second, subsequent mistrial because one of the jurors became sick.

There was a third mistrial because the jury was poisoned by finding out about prejudicial information that should not come forward. And then, in this fourt occasion, the judge was confronted with the defense attorney, with the agreement of the prosecutor, asking that trial be closed so his rights could be protected.

Now, if difficulties had occurred in this trial and if the motion had not been granted, certainly, difficulties could have come to this Court.

QUESTION: Mr. Attorney General, what was the reason for closing the trial -- the factual reason?

ATTORNEY GENERAL COLEMAN: The factual reasons were, first of all--

QUESTION: Are they in the record?

ATTORNEY GENERAL COLEMAN: Yes, they are.

They was a hearing that was conducted that was asked for after the disclosure was made. And that was made after the trial on the first day had been concluded and the jury had been sent home.

The defense attorney and the judge were concerned about the fact that on one occasion this prejudicial information had come to the jury and had kept them from trying the case. They had to try another case.

QUESTION: Could this have been prevented?

ATTORNEY GENERAL COLEMAN: Well, at the time this hearing was requested and these points were urged, sequestration and change of venue, the jury had already gone home that day, the trial had begun. It is obvious that sequestration is a possibility in any case like this that is used. But, in this case, they had had four trials. They had had some concern about someone in the jury, in the gallery or in the courtroom.

QUESTION: You didn't have the same jury each time, did you?

ATTORNEY GENERAL COLEMAN: No, we didn't; but someone who was in every one of the trials, apparently, was in the courtroom. And the jury had to, on each occasion, go out in front of the gallery where the public was and apparently the record is not completely clear on this, I think because these people tried the case so many times, it was kind of shorthand, they were concerned about members of the public having some conversation back and forth with the jury.

QUESTION: Well, couldn't the judge handle that by simply saying that all spectators must remain in their seats while the jury departs?

ATTORNEY GENERAL COLEMAN: I concede that.

QUESTION: Or the jury is to remain in the box until all the spectators are gone.

ATTORNEY GENERAL COLEMAN: I think that is true, but what we are confronted with now is looking back on a judge who is on the firing line, that had all of these factors and, on the request of the defendant, decided to close the trial. He granted an opportunity for a hearing when it was made later that afternoon. And these parties that are in this case today were in court that morning and made no objection to closure. They came back later that afternoon and read from some briefs and presented some oral argument and then said, "But we don't know", through counsel, "the reason why this case was closed." And then, when the reasons were explained, there was no response to that.

QUESTION: Mr. Attorney General, why did the judge need any reason to close the trial? I am talking about Constitutional reasons. I am not talking about Virginia law or any traditions of yours. Did you think there was some Constitutional reason suggesting why you shouldn't close the trial?

ATTORNEY GENERAL COLEMAN: I think the law is that if a prosecutor and if defense attorney and the defendant and the judge, two of whom are charged with the responsibility of representing the public interest, say they want the trial closed -- and I don't think that this

Court or any law shows that that can be unconstitutional.

QUESTION: So that as long as the three agree, the defendant, the prosecutor and the judge, you would close any criminal trial without any reason whatsoever insofar as the Constitution is concerned?

ATTORNEY GENERAL COLEMAN: I don't think that has to be reached in this case.

QUESTION: Well, it may not, because you may think you have a good enough reason, but if somebody disagrees with you, you might reach it and say whether, regardless of reason, you could close the trial.

Do you think there is some Constitutional barrier to closing trials when the three agree?

ATTORNEY GENERAL COLEMAN: I think when the three agree, when the public interest is represented, and I think the basis of many decisions in this Court is that the public interest is represented by the prosecutor and the judge, that historically you cannot blend the Sixth and First Amendments together. The Sixth Amendment I think arose--

QUESTION: All you needed to say at the hearing where the press and the people is that three people have agreed and we don't need any reason to close the trial.

ATTORNEY GENERAL COLEMAN: Well, I think I can certainly see that if abuses occur in which there was

case after case after case of closed trial it might be--

QUESTION: I know, but what Constitutional provision would be implicated, in your view, then?

ATTORNEY GENERAL COLEMAN: I will not concede that the First Amendment would. That would be the obvious one that would be advanced.

QUESTION: You wouldn't think the Sixth Amendment would, would you?

ATTORNEY GENERAL COLEMAN: That has been decided, I think.

QUESTION: The defendant, if he consents, is certainly in no position to raise a Sixth Amendment claim, particularly if he is acquitted by the judge.

ATTORNEY GENERAL COLEMAN: I think that's right.

QUESTION: You do -- your basic position, I gather, is you don't need any reason.

ATTORNEY GENERAL COLEMAN: I think there is a strong interest in public trials, and the Court has recognized that.

QUESTION: That may be so, but what about-- is there a Constitutional interest?

ATTORNEY GENERAL COLEMAN: I don't think it's a Constitutional interest. I don't think it has been exalted to that standing. I think the tradition of this Court has been on many occasions not to lay down a broad Constitutional rule in a case until there is some

experience to determine whether there is a problem and an evil that needs to be attacked by such a rule.

QUESTION: On your theory--

QUESTION: I am not sure about what sounds to me like a concession to Mr. Justice White that where the three agree, there is no Constitutional provision--

ATTORNEY GENERAL COLEMAN: That's right.

QUESTION: --regarding the opening--

ATTORNEY GENERAL COLEMAN: I think the Sixth Amendment is one that is personal to the accused. I think the purpose for it is to provide a fair trial. It is a procedural guarantee, and I don't think that someone could come in and object to any of these other rights he had, should he want to waive them, whether it is a jury, a speedy trial, or a question of having counsel. It doesn't mean he has a right to demand one. I think the Court has said that. He doesn't have a right to demand a private trial if the prosecutor and the judge don't agree.

QUESTION: Suppose this Court decided that this hearing today was to be closed, no one except counsel and the Court and the necessary attendants be present, and that was with the consent of both of you gentlemen?

ATTORNEY GENERAL COLEMAN: We would certainly have no appeal.

QUESTION: No, I agree with you. But what about-- I hadn't quite finished my question. What provision of the

Constitution explicitly would prevent that?

ATTORNEY GENERAL COLEMAN: I don't think it would.

QUESTION: Well, you can't point to any.

ATTORNEY GENERAL COLEMAN: I think if you opened the First Amendment application to the Sixth Amendment it becomes an unending proposition. How do you cut any governmental functioning or operation off from the public's right to ob serve it once you enter into that thicket. It seems to me that the idea of a right to know being founded in the Constitution is not legally or historically correct.

QUESTION: Do you think Congress could, if that step had been taken by this Court or any appellate court, Congress could provide a remedy?

ATTORNEY GENERAL COLEMAN: I think Congress could--

QUESTION: And say it must be open?

ATTORNEY GENERAL COLEMAN: I think the Congress could so long as it did not enact a law that was at odds with the procedural guarantee provided for the defendants. I don't think that the public -- that we could throw to the wolves the defendant because he has a Constitutional protection by providing some sort of right to know or requirement of public proceedings. It's a common law tradition; it's a tradition in Virginia. It has remained inviolate, but it seems to me in this case you are confronted

with a very limited, narrowly factually drawn case that ought not be reversed because the judge on the firing line was making a decision. He did not have time to think a year about it. He had time to think about it only that evening or in the morning when it was first made.

Now, the Appellants didn't make a motion when it could have been effective. If the judge had had this motion when the Order was made, there would have been some time to consider whether there might be more effective devices to protect the right of the defendant in the trial without having a private trial.

But this was not a case where it was not possible for the public to know what went on. Tapes were available as soon as the case was over. It was only a two-day trial. The defendant was acquitted. Those tapes were available. There was never any hint or suggestion that there was any corruption, that there was anything untoward, or that there was any attempt to cover up anything. I don't think, if you look at the record in this case, you can come to any other conclusion but that the judge was concerned about the focus of the Bill of Rights, which is the protection of the defendant in this case who was on trial for his fourth time.

QUESTION: Suppose, Mr. Attorney General, the judge at the opening of the trial said, "This is just one of those cases I think would be tried better without the

public here or the press. I am closing the courtroom. Do you have any objection, Mr. Defendant? It's immaterial to us." And the press and the public then want a hearing, and say, "We certainly have the right to sit in here. Certainly the defendant doesn't want to keep us out; it is you, Judge?" What about that?

ATTORNEY GENERAL COLEMAN: Well, I don't think there would be anything wrong with him providing a hearing. But it strikes me--

QUESTION: But still you couldn't find any Constitutional provision that they would be relying on to get them in the courtroom?

ATTORNEY GENERAL COLEMAN: I have a problem with believing that the First Amendment, freedom of expression argument transcends the political arena and the dialogue in ideas. I think all of the argument about a public forum is mis-directed here.

QUESTION: So, if the judge, even over the defendant's objection--

ATTORNEY GENERAL COLEMAN: Now--

QUESTION: Wait a minute. If the judge, even over the defendant's objection, closes the trial, the only person who has standing to raise any Constitutional argument is the defendant -- not the public, not the press, anybody?

ATTORNEY GENERAL COLEMAN: The public does. The prosecutor is there. He is elected. He is to represent the public interest. I think he could object to it. An d I think if the defendant--

QUESTION: By the way, on what Constitutional provision?

ATTORNEY GENERAL COLEMAN: I don't say it is on a Constitutional provision.

QUESTION: Well, that's what I asked you.

ATTORNEY GENERAL COLEMAN: Well, my answer to that is I think the defendant would come back into court on a writ of habeas corpus--

QUESTION: The defendant I know, but I want to know is he the only one who can object -- who has a Constitutional ground for objection?

ATTORNEY GENERAL COLEMAN: I would prefer not to be pushed on that, but if you ask me to, I certainly will oblige by saying I think the First Amendment talks about and is historically concerned about the expression and ideas about debate.

QUESTION: So the First Amendment is irrelevant to my question on that?

ATTORNEY GENERAL COLEMAN: I think it is.

Now, the point in this case is that to craft a rule that would presuppose, as I think the Appellant's argument does, that judges must not do their

duty, that they will not try to abide by the common law, the traditions in our State, which have never led to a closed trial in the history of Virginia insofar as I know, is the kind of proposition that will call into question many, many other rules of this Court. I think we can assume that. I think we have to assume regularity. And I think in this case when you consider that the Court has repeatedly told judges to use strong measures to protect a defendant's right to a fair trial, to be over-cautious, to prevent even the possibility of unfairness, that it was incumbent on the judge to consider that motion, and he did it in the context of recognizing that more error and more mistake in this case could ultimately have the defendant coming back and saying, "My rights were not protected."

QUESTION: Attorney General Coleman, if you are right that there has been such a long tradition of open trials in your State, and that the trial judge, as you say, was on the firing line, had to make a quick decision, how do you account for the Supreme Court of Virginia giving such short shrift to the matter?

ATTORNEY GENERAL COLEMAN: I think there are a couple of things there. I think, first, that if, when the Supreme Court, in reviewing what incidentally was not an attack on the statute, and we have made the point in our brief that this is not a proper case for appeal because that statute was never even mentioned by the Appellants

in the case, it was not cited; it was not attacked, we cannot say--

QUESTION: This is in the briefs of the Supreme Court of Virginia?

ATTORNEY GENERAL COLEMAN: That's right. We cannot say whether the Supreme Court passed on the statute or not. But it strikes me that the Supreme Court can be said to have viewed this as within the Gannett exemption; and that being when the prosecutor, the defense attorney and the judge agree that it is necessary for a fair trial and when it is cast against the publicity, the problems they had had with mistrials in the past, that the Supreme Court did not find reversible error.

QUESTION: But that's all, the cite of Gannett v. DePasquale, as I would read the Supreme Court of Virginia, settles the Federal Constitutional question, but if the State has this long tradition of open trials, is there any other reason that you know of why the Supreme Court of Virginia didn't perhaps write a little more on the subject?

ATTORNEY GENERAL COLEMAN: Well, I think that in this case they were not prepared to say that a common law interest and a tradition in open trials which has many beneficial effects, and this Court has agreed with that, when it is in confrontation with the right to have a fair trial, that all parties of interest in that case,

representing the public interest, the judge and the defendant felt was necessary, that the Supreme Court was not going to again say that.

Now, I think that it is certainly the case that maverick orders and decisions that depart from that can be corrected by State Court rules or by legislation as we have proposed in Virginia. But I don't think a Constitutional rule would be inflexibility that is obviously accompanied with laying that rule down as something that is needed here. It would raise a whole host of questions. First of all, if the First Amendment applies, that could be a limitless right that would spill over into many, many areas. And we have had terriffic problems with freedom of information legislation and trying to close loopholes and to determine where privacy starts and when the interest and the right to know begins. But a rule of court or statutory law can be changed, it can be altered and the judgment of the nation and the diversity of responses by the States have jtst not been able to move forward and occur in the short time since the Gannett decision was handed down.

QUESTION: Attorney General Coleman, what arguments were made to the Supreme Court of Virginia, only Federal Constitutional arguments?

ATTORNEY GENERAL COLEMAN: That's right. The statute itself was not actually attacked.

QUESTION: Well, I know, but maybe State law arguments might have been made--

ATTORNEY GENERAL COLEMAN: That's right.

QUESTION: --upon this long tradition you have told us about in Virginia.

ATTORNEY GENERAL COLEMAN: And the Constitutional arguments.

QUESTION: Were oral Constitutional arguments made to the Supreme Court of Virginia?

ATTORNEY GENERAL COLEMAN: I think I am correct on that. You are talking about the other side?

QUESTION: Yes.

ATTORNEY GENERAL COLEMAN: I believe I am correct in that. I didn't--

QUESTION: The Sixth and Fourteenth Amendments and the First and Fourteenth Amendments.

ATTORNEY GENERAL COLEMAN: That's right. No statutory--

QUESTION: Only those arguments and no State common law arguments?

ATTORNEY GENERAL COLEMAN: I believe that's right.

QUESTION: Is that correct? I am just trying to get it -- suggestions to the answer of Mr. Justice Rehnquist's questions.

ATTORNEY GENERAL COLEMAN: There may be Federal Constitutional questions.

QUESTION: But no State Constitutional questions?

ATTORNEY GENERAL COLEMAN: That's right.

QUESTION: Or State common law?

ATTORNEY GENERAL COLEMAN: That's right.

QUESTION: The trial judge ruled on the statute, didn't he?

QUESTION: He relied on it.

QUESTION: Well, he ruled on it, didn't he?

ATTORNEY GENERAL COLEMAN: I think he mentioned the statute.

QUESTION: He ruled on the statute, he built an opinion on the statute, that Order was appealed, and you say the statute is not involved?

ATTORNEY GENERAL COLEMAN: I am saying that the Appellants never drew the constitutionality of the statute into question in the trial. They did not mention it.

QUESTION: Why did they say the judge shoudl be reversed?

ATTORNEY GENERAL COLEMAN: They said that there was an interest in the public to have the trial open to the public.

QUESTION: Wasn't it aimed at the statute?

ATTORNEY GENERAL COLEMAN: If it was, they didn't

mention it.

QUESTION: Well, it was in the Order. They didn't mention the Order?

ATTORNEY GENERAL COLEMAN: It wasn't in the Order. It was just in the oral record in which the judge mentioned the statute.

QUESTION: He relied on it and said the statute--

QUESTION: And you are saying the statute wasn't mentioned to the Supreme Court of Virginia?

ATTORNEY GENERAL COLEMAN: My position is that the question was not ruled upon by the Supreme Court of Virginia.

QUESTION: You are not saying it wasn't argued or mentioned?

ATTORNEY GENERAL COLEMAN: It was mentioned by the judge. The judge mentioned the statute, but at no time was it--

QUESTION: But in the Supreme Court nobody mentioned it?

ATTORNEY GENERAL COLEMAN: Nowhere mentioned. It was not even mentioned. Now, we mentioned in our response, we referred to the statute along with other grounds. The other side--

QUESTION: I don't want to get involved in language. Was it mentioned parenthetically by anybody else?

ATTORNEY GENERAL COLEMAN: The State mentioned it.

QUESTION: Did anybody else mention it parenthetically?

ATTORNEY GENERAL COLEMAN: The Commonwealth Attorney.

QUESTION: The Commonwealth Attorney and the Appellant did not? They didn't even refer to it tangentially, in passing -- listen to me, please. They never mentioned it?

ATTORNEY GENERAL COLEMAN: The court?

QUESTION: No, the Appellants.

ATTORNEY GENERAL COLEMAN: No, they did not.

QUESTION: Never mentioned it?

ATTORNEY GENERAL COLEMAN: Never mentioned it.

QUESTION: Did the Richmond newspapers rely on any provision of the State Constitution to invalidate this statute and this closure?

ATTORNEY GENERAL COLEMAN: No.

QUESTION: Are there similar provision in the Virginia Constitution?

ATTORNEY GENERAL COLEMAN; No, the Virginia Constitution--

QUESTION: Does it require a public trial?

ATTORNEY GENERAL COLEMAN: No, it doesn't. But it has a First Amendment. But it doesn't have anything

different from saying the defendant has a right to a public trial.

QUESTION: And there was no claim that under Virginia's Constitution this closure was invalid?

ATTORNEY GENERAL COLEMAN: No.

QUESTION: Then what do you suppose the statute means when it talks about the right of the accused to a public trial?

ATTORNEY GENERAL COLEMAN: There is a right to a public trial in Virginia.

QUESTION: But there is not a Constitutional right?

ATTORNEY GENERAL COLEMAN: Yes, there is a Constitutional.

QUESTION: I thought you just answered my question that there was not.

ATTORNEY GENERAL COLEMAN: There is.

QUESTION: There is a provision in the Virginia Constitution?

ATTORNEY GENERAL COLEMAN: There is.

QUESTION: For public trial?

ATTORNEY GENERALCOLEMAN: Yes. There is a right to have a trial, a public trial.

QUESTION: In a criminal or civil case?

ATTORNEY GENERAL COLEMAN: No, in a criminal case.

QUESTION: Well, was that provision invoked in this case at all?

ATTORNEY GENERAL COLEMAN: No, it was only the Federal rights that were invoked in this case by the Appellants.

QUESTION: Are there any prior Virginia cases that deal with the right to public trial?

ATTORNEY GENERAL COLEMAN: No, we found no Virginia law, and it was not raised in that case. The matter that is before the Court is a very unusual factual case, as I have suggested to the Court, that involves a clear concern on the part of the judge about the fairness of the trial. It is the fourth time the case had been tried. There were very unusual circumstances and when this motion was made by the Appellant to open it, it came late. It came without the ability for him, really, to take these alternative precautions that could have been if it had come earlier. And the judge, in view of all of that, felt that he would go ahead and close the trial. He certainly gave deference to any interest that the public would have in a public trial. He certainly was concerned about the defendant's position, and he was certainly concerned about what would happen in the future.

The fact is that the case ended in an acquittal. The fact also is that tapes were available to the public and to everyone else to find out what had happened in court,

and how it had happened. But it is simply the position of the State that this judgment should not be reversed; that in this case all the considerations that could be taken into account were taken into account by the Court, and that it does not reflect a policy of not giving due respect to the public interest in a public trial. And for that reason, we urge that on the merits the case should not be reversed, and we would also urge that from a procedural standpoint, since we do not know what construction the State Supreme Court would have placed on this statute if it had been contested by the Appellants, we do not believe that it is appropriate for this case to come on appeal.

We also think, since the jurisdictional question has been reserved that the certiorari ought not to be granted in this case because there needs to be sufficient time for the State to respond to the Gannett decision.

MR. CHIEF JUSTICE BURGER: You have about two moments left, Mr. Tribe.

REBUTTAL ARGUMENT BY MR. TRIBE

MR. TRIBE: Thank you, Mr. Chief Justice.

Let me initially just correct a couple factual things. There was reliance below by the Appellants also on the Virginia Constitution's due process provisions. But the overwhelming emphasis was on the Federal

Constitution.

QUESTION: Was there reliance on the public trial provision?

MR. TRIBE: No, there was not, because it is available only to the accused, I guess, under Virginia tradition, and I think the Attorney General was right there was no case law to rely on. And it was for that reason--

QUESTION: The Virginia law is like Gannett -- that public trial provision is available only to the accused?

MR. TRIBE: I have to tell you, Mr. Chief Justice, I am not certain, but that was my impression.

The First Amendment argument here to which I want to turn is perfectly focused on Mr. Justice White's question. The position I think that the Attorney General is taking has nothing to do with the fact the accused wanted a private trial. Under their view, even if the accused -- if the judge simply said, "I don't want anybody to know", there would be no First Amendment violation because they think the First Amendment really protects only speech, and this Court has repeatedly held otherwise, in Virginia Board of Pharmacy, in Lamont, and a number of other cases.

It seems to me that when you add the defendant's request, it doesn't change anything. It is just a request

by a private individual to invoke a censorial power which, by this Court's own decisions in cases like Lamont, would not be acceptable.

I think the more general point is that the Constitutional philosophy which the Attorney General espouses is really upside down. It is his posture that this Court should be a problem solver and wait until complicated problems arise and fashion a solution. That is not my understanding of this Court's role. This Court should articulate what the Constitution has traditionally meant, and it has traditionally meant what was perhaps too obvious to put in so many words that criminal trials are to be public. The First Amendment provides a perfect textual home for that principle, due process would do as well.

And a violation of publicity here is surely not rectified by the existence of a taperecording. It turns out to be garbled, one can't hear it.

QUESTION: And the reason you say the First Amendment provides an appropriate home for that concept is that this case is distinguishable from such cases as Sa[illegible]by--

MR. TRIBE: Pell and even Hutchins.

QUESTION: By reason of the fact that somebody has a right to open up these proceedings?

MR. TRIBE: Exactly.

QUESTION: And it is to that extent that you look to the Sixth Amendment.

MR. TRIBE: That's right.

QUESTION: And also limits--

MR. TRIBE: That limits--

QUESTION: Saxby, Pell or--

MR. TRIBE: Hutchins.

QUESTION: --or between the President and Members of his Cabinet, or whatever.

MR. TRIBE: But it is also not just the support described by the Attorney General. The suggestion that they make is this was a maverick decision by the trial judge. It was approved by the Supreme Court of the State of Virginia and if, on the firing line, people are going to err on the side of closure because they don't want to get reversed, and do that in circumstances like this, it becomes important even from the Attorney General's perspective--

QUESTION: Mr. Tribe, the Attorney General said the maverick decision can be corrected by the Supreme Court of Virginia, not that this was a maverick decision.

MR. TRIBE: Well, if this was what he regards as an acceptable decision, then I think it proves the need for this Court's intervention in the name of the First and Fourteenth Amends.

QUESTION: Mr. Tribe, before you--

QUESTION: The defendant didn't do anything about it. He was acquitted.

MR. TRIBE: Well, I am not defending the defendant.

QUESTION: It is the State's position that nobody has any right there but the defendant and he was acquitted, so that's the end of the ballgame.

MR. TRIBE: But the First Amendment will have to be vindicated somehow.

QUESTION: It is said that the prosecutor represents the public interest, and he consents. What would be the Constitutional source of the public interest that he represents?

MR. TRIBE: I have no idea at all. The prosecutor is elected, I suppose, to serve a certain public role. But surely he does not control the First Amendment rights of all.

QUESTION: But if by definition the public trial provisions of the Sixth Amendment is for the defendant's protection, and yet the prosecutor can open it up.

MR. TRIBE: It becomes problematic. It's hard to see I imagine under any State Constitution how a prosecutor could explain the exercise of that kind of power.

My time is up.

QUESTION: Before you sit down, what provision of the Constitution did the Court draw on to make a presumption of innocence part of our fabric?

MR. TRIBE: Mr. Chief Justice, the Rinship case drawing only on the general language of the due process clause is a perfect parallel because in Rinship, the Court held that one of the fundamental reasons that, even though it is not mentioned, the requirement of proof beyond reasonable doubt is implicit in the Constitution is that it is central to trust in the system of justice and central to legitimacy. Certainly no less central is the right of public trial.

QUESTION: Was there not also some hints that this was the tradition in 1787, '89, '90 and '91.

MR. TRIBE: Tradition as well, both in Rinship and here, and in a number of other cases provides an additional basis for making it clear that the Court is not fashioned in a new light, that this is the oldest and best established.

QUESTION: And so that argument would apply to both civil and criminal cases, wouldn't it?

MR. TRIBE: That would be much broader and one would have to know more than I have discovered about the tradition in civil cases to be absolutely sure, but the Court needn't decide that in this case.

QUESTION: I think you will find that the tradition is the same.

QUESTION: May I ask a question?

In response to Mr. Justice Stewart, I understood you to say that Saxby and Hutchins are not controlling because those cases did not involve a situation in which there was the right on behalf of someone to have the proceedings opened up. Here is the Sixth Amendment right on behalf of the defendant to open them up, and that is what distinguishes those cases.

But is there not, did we not decide earlier or agree earlier, that there was a Sixth Amendment right on the part of the defendant to open up the pretrial proceeding? If that is the case, and if your theory is correct, your theory requires us to overrule Gannett, is that right? If your thrust is right, compelling necessity.

MR. TRIBE: I think Mr. Justice Stewart's majority opinion took the position that even if the First Amendment applied, on the record in Gannett, it was adequately served.

QUESTION: But your test is, if I understand you right, the rule of the First Amendment right of access applies and that right can only be rejected on a showing of compelling need. There was no showing of compelling need

in Gannett, as I understand it. There was just a showing of sufficient basis for closing it up.

MR. TRIBE: Mr. Justice, I think there will be nonetheless one way to resolve that question without overruling Gannett, and that is as a prophylactic device one can say that in a context like pretrial suppression hearings where the requirement of showing compelling need institutionally would be impossible to meet but where, nonetheless, there are a lot of cases where indeed there is a compelling need, though you can't prove it. That the requirements of the First Amendment can be somewhat relaxed because of the powrful conflict of the right of a fair trial.

In the context of a trial, there is no similar reason to relax the meaning of compelling necessity. And it is for that reason that one might justify what Gannett suggested as a permissible over caution in the interest of the rights of the accused. But it would not distress me greatly were one to conclude that perhaps a tighter standard should have been applied in Gannett. This case doesn't require that.

QUESTION: You would also not prevail by applying a different standard than compelling need.

MR. TRIBE: You could prevail by applying any standard other than no need at all.

QUESTION: That's right.

MR. TRIBE: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2: 25 o'clock p.m. the case was submitted.)

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