THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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Lucy A. Dalglish
Executive Director

October 23, 2003

John D. Ashcroft
United States Attorney General
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-001

Re: Secret dockets in D.C. District Court

Dear Attorney General Ashcroft:

On behalf of The Reporters Committee for Freedom of the Press, we are writing to express our concern that federal prosecutors in Washington, D.C., and perhaps elsewhere, are not complying with Department of Justice guidelines on openness in judicial proceedings.

According to a report by Karen Branch-Brioso in today's *St. Louis Post-Dispatch*, Shelly Snook, an aide to Chief Judge Thomas F. Hogan of the U.S. District Court for the District of Columbia, says that "he and Hogan estimate '30 to 40 percent of the criminal cases that come over here are sealed – and that's at the motion of the prosecutors.'" Snook "said it happens mainly in drug cases where some defendants are cooperating and the government doesn't want fellow conspirators to know."

If the estimate attributed to Chief Judge Hogan is even remotely accurate, it raises serious doubts about whether federal prosecutors are adhering to the Justice Department's established policy on open judicial proceedings, set forth at 28 C.F.R. § 50.9.

That policy, which has been in effect since 1980 (with minor amendments), recognizes that "[b]ecause of the vital public interest in open judicial proceedings, the Government has a general overriding *affirmative duty* to oppose their closure." 28 C.F.R. § 50.9 (emphasis added). It further states that closure will be justified in "very few cases," and that government attorneys should not seek, or consent to, the closure of any proceeding unless "plainly essential to the interests of justice."

Clearly, 30 to 40 percent does not constitute "very few cases." There is no plausible justification for conducting such a large percentage of the business of the federal criminal courts in secret, whether in drug cases or other criminal matters.

We also question whether government attorneys in the D.C. District Court are following the policy's procedural requirements for closing proceedings. Before seeking or consenting to closure, a government attorney must, *inter alia*, provide the public with "adequate notice" by making a motion for closure "on the record," *id.* § 50.9(c)(4); obtain the express authorization of either the Deputy Attorney General or, in some cases, the Associate Attorney General, *id.* § 50.9(d); and release transcripts of the closed proceeding as soon as "the interests requiring closure no longer obtain," *id.* § 50.9(c)(5). We are aware of no evidence that government attorneys are following these rules in the D.C. District Court.

The only justification cited by Mr. Snook for sealing cases – namely, to conceal the cooperation of certain defendants in drug cases – is not among the exceptions to the guidelines set forth in 28 C.F.R. § 50.9. The only recognized exceptions are for national security, in camera proceedings, grand jury proceedings, conferences at bench or in chambers, and the protection of *child* victims or witnesses. *See id.* § 50.9(e)(1)-(5). If it is true that cases are most commonly sealed for the reason Mr. Snook cites, that practice appears to violate Justice Department policy.

It is unclear from Mr. Snook's comments whether courtroom proceedings, as well as docket entries and pleadings, are being closed to the public. But the use of secret dockets and sealed pleadings effectively deprives the public of access to in-court proceedings as well, because it conceals the existence of cases, and the scheduling of proceedings, in the first place.

The Supreme Court has long recognized that the public and press have a qualified First Amendment right of access to criminal proceedings. *See*, *e.g.*, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). Although the right is not absolute, it cannot simply be ignored. Rather, if the particular type of proceeding has historically been open to the press and public, and public access plays a "significant positive role" in the functioning of the proceeding, then the First Amendment right of access applies. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*). The proceeding can then be closed only upon a specific, on-the-record finding that closure "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*).

In light of the comments attributed to Chief Judge Hogan in today's *Post-Dispatch* story, we request that the Justice Department promptly investigate whether government

attorneys in the D.C. District Court are complying with 28 C.F.R. § 50.9. We also request that the Justice Department examine whether a similar practice of routinely sealing cases in violation of the policy is occurring nationwide. Finally, we ask that all government attorneys be reminded of the existence of the policy on open judicial proceedings, and of their obligations under it.

Thank you for your attention to this matter.

Sincerely,

/s/

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