UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION

B-211253

APRIL 21, 1983

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the Administration of Justice
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

Subject: Closed Criminal Plea and Sentencing Proceedings by U.S. Attorneys (GAO/GGD-83-56)

In your August 11, 1982, letter, you requested that we examine the Department of Justice's practice of conducting criminal plea and sentencing proceedings in closed district court sessions. Justice's regulations provide, as a matter of policy, a presumption that judicial proceedings will be open to the public unless closure is essential to the interests of justice. They also require Government attorneys to obtain permission from the Associate Attorney General in criminal cases before seeking or agreeing to closure. We found that closing criminal plea and sentencing proceedings was uncommon and generally used only to protect cooperating defendants or ongoing investigations. We also found that Justice, when requested, was cautious and deliberate in approving closed proceedings, basing its decisions on the individual circumstances of each case.

However, Justice does not have a centralized monitoring system to ensure that cases approved for closure are unsealed as soon as possible. Further, while all U.S. attorneys included in our evaluation now realize that approval is necessary before closing plea or sentencing proceedings, they had differing views as to what other proceedings required approval prior to seeking or agreeing to closure. As agreed with your office, we have advised the Attorney General by separate letter that these two matters are worthy of his attention.

(181730)

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of our evaluation were to determine the Department of Justice's policy regarding the closing of criminal plea and sentencing proceedings, the implementation guidance provided to U.S. attorneys, the extent of such closed proceedings, the circumstances that required closure, and U.S. attorneys' compliance with Justice's policy and guidelines. To assist our evaluation, Justice provided us with a list of 12 closures approved between October 1, 1981, and November 30, 1982, along with individual case profiles.

We conducted onsite evaluation work at the Department of Justice's Criminal Division in Washington, D.C., and at four U.S. Attorneys' Offices--the southern and eastern districts of New York and the districts of Massachusetts and Rhode Island. In addition, we contacted nine other U.S. Attorneys' Offices to discuss their methods of operation. The reasons that these 13 districts were selected follow.

--The southern district of New York was specifically identified in the request letter as an extensive user of closed criminal plea and sentencing proceedings. The situation was detailed in the New York Times.

--The southern districts of California, Florida, and Texas; the eastern districts of Pennsylvania and New York; and the District of Columbia were selected because they had high criminal case filings.

--The districts of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont were selected because they generally had a small number of criminal case filings.

We interviewed Criminal Division officials, U.S. attorneys, and assistant U.S. attorneys to ascertain Justice's policy and guidelines as well as actual practices in the U.S. Attorneys' Offices. We also spoke with the New York Times reporter who reported on the southern district of New York's practice of using closed proceedings. Our purpose was to ascertain the source of her information. We reviewed Justice's policy statements and guidelines as contained in its regulations, newspaper articles, various court documents, and the Federal Rules of Criminal and Civil Procedures to obtain additional information on the procedures governing the use of closed proceedings. Our

work was conducted in accordance with generally accepted Government auditing standards.

DEPARTMENT OF JUSTICE POLICY ON CLOSURE

Justice policy and implementing guidelines are set forth in the Code of Federal Regulations (28 CFR 50.9) (1982) as well as in the United States Attorneys' Manual. The regulations provide that because of the vital public interest in open judicial proceedings, there shall be a strong presumption against the closure of any judicial proceedings. Further, Government attorneys should ordinarily oppose closure and should move for or consent to closure only when closure is plainly essential to the interests of justice.

The regulations contain guidelines describing the circumstances under which a Government attorney may move for or consent to closure of a criminal proceeding. Generally, the circumstances relate to whether the failure to close the proceeding will produce a substantial likelihood of denial of a fair trial or danger to persons or ongoing investigations. The guidelines also provide for notice of the proposed closure, unsealing the transcripts of the closed proceeding as soon as the interests requiring closure no longer exist, and minimizing the degree of closure to the greatest extent possible. The guidelines require that before a Government attorney may seek or agree to the closure of criminal proceedings, express authorization of the Associate Attorney General should be obtained.

These guidelines apply to all Federal trials, pre- and post-trial evidentiary hearings, plea proceedings, sentencing proceedings, or portions thereof. They do not apply to closure necessary to protect national security information or classified documents; in camera (closed) inspection; consideration or sealing of documents provided to the Government under a promise of confidentiality where permitted by statute, rule of evidence, or privilege; grand jury proceedings or proceedings ancillary thereto; or conferences traditionally held at the bench or in chambers during the course of an open proceeding.

Justice officials told us that there is no specific legal authority to close a proceeding. Rather, judges do so under their general authority to operate the courts and administer justice in the best public interest and in the absence of any general or specific prohibition. The judges will generally base their decisions on case law (including Supreme Court decisions)

and a common-sense perspective of whether closure is necessary and justified.

CLOSURES APPROVED BY JUSTICE

Between October 1, 1981, and November 30, 1982, Justice approved closures of certain proceedings in 12 cases supervised by the Criminal Division. Justice officials told us that the Associate Attorney General personally reviews all requests and has not delegated the approval authority. Eight closures were approved during fiscal year 1982; the remaining four were approved during the first 2 months of fiscal year 1983. Of the eight approved during 1982, four involved pleas and the others involved a bond hearing, an arraignment, a hearing regarding jury misconduct, and a hearing on a selective prosecution motion filed by a defendant. Two of the four pleas took place in the southern district of New York while the other two took place in a Federal district court in Pennsylvania. Justice officials would not identify the district because of the extreme sensitivity of the cases and vulnerable stage of the proceedings. Likewise, Justice would not provide us with full details on the four cases that were approved in October and November 1982. Justice did tell us that all four cases took place in the southern district of New York and each involved a defendant who pled guilty and was cooperating with ongoing investigations.

With regard to the unsealing of the records of closed proceedings, the regulations merely state that the proceedings should be unsealed as soon as the interests requiring closure no longer exist. Justice, however, does not have a centralized system to monitor the status of sealed records; rather, it relies on the U.S. attorneys to move on their own initiative for unsealing as soon as possible. Even though we did not identify any situations where proceedings were not unsealed in a timely manner, we have advised the Attorney General that he needs to consider whether such a system should be established. This system would allow Justice to evaluate its control of closed proceedings and better safeguard the public's right. Department monitoring would require little effort because of the small number of approved closings.

ONLY ONE U.S. ATTORNEY'S OFFICE EXTENSIVELY USED CLOSURES

Only one of the 13 U.S. Attorneys' Offices we contacted--the southern district of New York--extensively used closed proceedings for accepting pleas and for sentencing. The closing

of plea proceedings was far more common than the closing of sentencing proceedings. Prior to July 1982, this district had not been requesting approval prior to seeking or agreeing to closure. The district had previously viewed pleas and sentencings as ancillary to grand jury proceedings and, therefore, did not require prior approval by the Associate Attorney General. This practice was brought to the attention of Justice officials through an article which appeared in the New York Times on April 23, 1982. Justice advised the district in July 1982 that it was required to seek prior approval before seeking closure of all pleas and sentencings. Justice also reemphasized this requirement to all U.S. Attorneys' Offices.

Because the U.S. Attorney's Office in southern New York does not maintain records of the occurrence of closed proceedings, we were unable to determine the exact number of times the practice was used. However, with the help of the U.S. attorney, we were able to identify 16 assistant U.S. attorneys who had handled closed plea or sentencing proceedings. These assistant U.S. attorneys told us that during approximately the last 4 years they could remember being involved in about 42 closed plea and 6 closed sentencing proceedings. The assistant U.S. attorneys stated that they personally knew of only 2 of the 48 criminal cases where prior approval was sought and received from the Associate Attorney General as required by Justice policy. These two cases took place subsequent to July 1982. Prior to July 1982, the chief of the district's criminal division had been authorizing assistant U.S. attorneys to seek or agree to closure. The assistant U.S. attorneys told us that all proceedings are unsealed as soon as the need for secrecy ceases.

Why the southern district of New York closes plea and sentencing proceedings

The assistant U.S. attorneys in the southern district told us that they close plea and sentencing proceedings when a defendant cooperates with an ongoing prosecution or investigation. In addition, they told us closure is sought only when they believe it is necessary to protect the defendant from physical harm or intimidation or to shield an investigation from public disclosure.

The assistant U.S. attorneys advised us that the extensive use of closed proceedings in their district was influenced by

--the extremely large criminal workload, especially in the highly dangerous areas of drug and racketeering violations,

--aggressive defense attorneys who pressure the U.S. Attorney's Office to have their cooperating clients shielded,

--the ineffectiveness of efforts to maintain a veil of confidentiality over unsealed district proceedings, and

--the desire of some district judges to hear cases and not wait for a defendant to finish cooperating with the Government before accepting a plea and sentencing.

Why other districts do not close plea or sentencing proceedings

Officials of the other 12 districts we contacted cited various reasons for not having used closed plea or sentencing proceedings. The reasons fell into the following three categories:

--The criminal activity that would require the type of secrecy that closure provides is not prevalent in their districts.

--They were unaware of the closure procedure and used other methods to prevent improper disclosure.

--Officials were generally opposed to closing any proceedings and used other methods to protect certain proceedings.

District officials told us that some of the methods used included placing individuals in the Witness Security Program, using remote court locations, and entering informal agreements with defense attorneys and/or presiding district judges.

Public notice is being given

Justice's regulations require that the public be given adequate notice of the proposed closure. However, they do not prescribe the nature or form such notice should take. Therefore, each U.S. Attorney's Office decides what is appropriate on a case-by-case basis. A Justice official told us that the notice requirement is intended to protect the public's right to know and to reflect several Supreme Court decisions which emphasize

the public's right to know that a case is being closed. Our evaluation showed that the southern district of New York was providing public notice for its closed plea and sentencing proceedings. The district announces on the daily court criminal calendar when a closed plea or sentencing is to take place. The announcement identifies a defendant as "John Doe" and states the nature of the proceeding, the judge presiding, and the time of the proceeding. The chief of the district's criminal division told us that this practice has created no problems.

CONFLICTING VIEWS AS TO WHAT CLOSURES REQUIRE APPROVAL

As previously noted, the southern district of New York had not obtained Justice's prior approval for plea and sentencing closures because of a misunderstanding of the guidelines contained in the regulations. We found that the problem of interpretation was not limited to these types of closures. In fact, officials of U.S. Attorneys' Offices we spoke with had different opinions on what proceedings required Justice approval prior to seeking or agreeing to a closure. Some officials told us that they would not seek approval to close arraignments or bond hearings. Yet, as previously stated, Justice was requested by other U.S. attorneys to approve closure of these types of proceedings during fiscal year 1982. Because some U.S. attorneys have requested such approvals while others said they would not seek approval, we advised the Attorney General that he should consider whether the closure policy needs to be clarified to ensure consistent application in U.S. Attorneys' Offices of the types of proceedings other than plea and sentencing proceedings that need prior approval.

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We believe U.S. attorneys are now more aware of the need to obtain Justice's approval before seeking or agreeing to closure of plea and sentencing proceedings. Furthermore, the actual use of such proceedings has been very limited with most districts not needing to use it or using other methods to protect the proceeding. The sole district that utilized the practice extensively did so because of the unusual nature of the district's workload and a misunderstanding of Justice's guidelines. This district now obtains Justice's prior approval before seeking or agreeing to closure. However, we advised the Attorney General, as agreed with your office, that consideration should be given to (1) establishing a centralized monitoring system to ensure that cases are unsealed as soon as possible and

(2) clarifying the closure policy on what types of proceedings, other than plea and sentencing proceedings, require prior approval to ensure consistent application in all U.S. Attorneys' Offices.

As agreed with your office, we did not obtain formal comments from the Attorney General regarding this report. However, we did discuss the results of our work with officials of the Criminal Division. These officials agreed with the facts as reported as well as with the merit of establishing a centralized monitoring system and clarifying Justice's closure policy.

We trust the information provided will be useful to you in your continuing effort to ensure the proper administration of justice. As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 15 days from the date of this report. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director