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Secret Federal Courts

Judiciary invites suspicion by closing case files

Editorial

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The Sixth Amendment isn't short on clarity. "In all criminal prosecutions," it states, "the accused shall enjoy the right to a speedy and public trial . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense." The amendment is routinely flouted with regards to mostly foreign prisoners held by American forces in a network of prisons at Guantanamo Bay and elsewhere.

The Associated Press revealed over the weekend that the amendment is being routinely flouted at home, too. Federal courts are keeping the records of thousands of defendants sealed, during and after their journey through the courts. Almost all the defendants are criminals or suspects involved in violent or drug crimes, not terrorism. Some are witnesses who cooperate with prosecutors in order to secure more lenient plea bargains. But as with war-on-terror prisoners at Guantanamo Bay, it's impossible to know the details of their cases down to when they did or would appear in court. Since 2003, 5,116 such cases were completed but have remained for the most part secret.

Darkness extends to court dockets, making deception part of the judiciary's operations: The Associated Press' investigation found that in 469 criminal cases in one federal district court, electronic queries through the court's computerized docket return what essentially amounts to a lie: "no such case."

This is happening in the United States, in American courts, in full view of the Constitution. It's happening even though the Supreme Court ruled that all criminal cases, in accordance with the Sixth Amendment, must be public, with case-by-case exceptions, as when too much publicity might prejudice a jury or endanger the life of an individual, or when minors are involved in certain types of crime. But both the increasing number of secret cases and the type of alleged crimes they involve point to a pattern of presumptive secrecy that bypasses the case-by-case justification of keeping records sealed. Why? The U.S. Justice Department won't say -- a silence that in itself is another way to flout accountability.

Given the Bush administration's predisposition to seal first and talk later, if at all, the growing secrecy in federal courts is not surprising. It fits a pattern that has turned into a shadow of a shadowy government -- a rapid increase in the classification of documents across the federal branch, a rapid decrease in the de-classification of documents at the National Archives (and in some cases, the reclassification of documents previously made public); deliberate foot-dragging in compliance with Freedom of Information requests; and in critical areas, systematic refusals by the White House to share information with Congress or comply with requests for data from congressmen on matters ranging from energy to the environment to, routinely, national security.

The judiciary, however, is supposed to be independent of the executive branch, and its presumption of openness untainted by executive policies. "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society," the Supreme Court ruled in 1948, "the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." Openness ensures fairness by preventing secret deals, favoritism, inaccurate rulings, and making perjury apparent beyond the courtroom. Just as important, open courts are part of the way open societies literally see that

justice is done -- not just so far as the accused is concerned, but in the way that the accused is adjudicated: The judicial system, too, should be accountable. In secret, nothing is.