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AMERICAN CIVIL LIBERTIES UNION

Please respond to
☐ ACLU Headquarters
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 New York, N.Y. 10012
 (212) 996-6233

Lawrence Repeta, Esq.
 1500 IBM Building
 Seattle, WA 98101

Re: Tokyo High (Appellate) Court decision
 upholding judge's discretion to bar note-
 taking in the courtroom.

Dear Mr. Repeta:

Thank you for sending us the Tokyo High Court's decision (as well as the Tokyo District Court's decision and other background materials) in the "Courtroom Notes Litigation." As you requested, we will comment on the High Court ruling from our perspectives as officers of the American Civil Liberties Union ("ACLU")¹ and scholars of American constitutional law.

In explaining our conclusion that the Tokyo High Court's decision is inconsistent with deeply established premises of American constitutional law, as well as civil liberties principles espoused by the ACLU, we do not mean to suggest that Japanese courts should necessarily follow the principles

¹ The ACLU is a nationwide, nonpartisan organization with more than 250,000 members, dedicated to preserving the civil liberties guaranteed by the United States Constitution and laws. Founded in 1920, the ACLU has affiliate organizations throughout the United States. Drawing upon the services of numerous volunteers, as well as a sizeable paid staff, the ACLU and its affiliates defend civil liberties through litigation, legislative lobbying, and public education. The ACLU appears in the United States Supreme Court more frequently than any other litigant, with the sole exception of the United States Government.

*2 copies to be
 Mail one copy
 Carole Vinton
 one of 1977*

Eleanor Holmes Norton
 CHAIR
 NATIONAL ADVISORY COUNCIL

April 14, 1988

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enunciated by the United States Supreme Court, or by the ACLU, in interpreting the United States Constitution.² However, you have told us that many people in Japan who are concerned about the Courtroom Notes Litigation would be interested in learning how the same case would be viewed by American courts and by the leading U.S. civil liberties organization. Accordingly, we offer the following information and conclusions for the reference of such interested persons.

The right of courtroom observers to take notes is an essential aspect of the public's right to receive information about the functioning of the judicial system in general and the handling of individual cases in particular. This right has always been a cornerstone of American jurisprudence. Throughout our history, the right of a public trial has inured to the benefit not only of the litigants, but also of the public at large. Proceedings subjected to public scrutiny, and hence to possible criticism, are less likely to be tainted by the procedural and substantive unfairnesses which have poisoned such closed courts as the British Star Chamber.

An integral component of the litigant's/public's mutual right to an open trial has always been the right of the press and other members of the public who attend a trial to take notes about the proceedings. This right is an important element in the preservation of the open trial system because it enables all members of the public who attend trials to enhance their understanding of such trials by recording contemporaneously both what they observe and their attendant thoughts. In addition, the right of courtroom spectators to take notes allows persons who cannot attend a trial personally to exercise their rights indirectly or vicariously by referring to the contemporaneously recorded impressions of persons who were actually present.

To be sure, the public's interests in open judicial proceedings, fundamental as they are, do not necessarily always square with those of the litigants. In particular cases, other

² We do note, however, the similarity between Article 21 of the Japanese Constitution and the First Amendment of the United States Constitution; indeed, the Japanese constitutional provision is written in even more broadly protective terms than its American counterpart. While the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," Article 21 of the Japanese Constitution states, more expansively, that "freedom of assembly, as well as speech, press and all other forms of expression are guaranteed."

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interests of the litigants, also of constitutional stature, may outweigh their constitutional rights, and the corresponding rights of the public, to an open trial. For example, in a case involving particularly sensitive parties (e.g., young children) or issues (e.g., disputes involving sensitive family relationships), the parties' privacy rights might prevail over the countervailing public trial right. The other major conflict of this type arises in situations where a public presence in the courtroom is so disruptive that it could jeopardize a criminal defendant's constitutional right to a fair trial. See N. Dorsen & L. Friedman, Disorder in the Court (1973) (Report of the Special Committee on Courtroom Conduct of the Bar Association of the City of New York) (this book has been translated into Japanese in two volumes).

To deal with these situations of conflict, the U.S. Supreme Court has enunciated principles for balancing the fundamental right of an open trial against other fundamental rights. The Court's analysis consistently begins from a strong presumption that the open trial right should be maximized, and it imposes a heavy burden of proof upon the party seeking to overcome this presumption.³

³ See, e.g., Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1981) (holding that the press and the public may be denied access to criminal trials only when the government can show that such denial is necessary to promote a compelling government interest and is narrowly tailored to serve that interest).

In light of the high degree of protection and the broad scope which Supreme Court decisions have consistently accorded to the public/press right to attend trials, it is ironic that the Court currently has an internal operating rule which appears to be inconsistent with its own legal holdings in this area. To the best of our knowledge, this rule was promulgated by Chief Justice Burger; it authorizes Supreme Court guards to limit or regulate note taking during the Court's sessions by individuals other than lawyers admitted to practice before the Court and certain members of the press; the rule is not strictly enforced (for example, we are aware of individuals who are neither admitted to the Supreme Court Bar nor members of the press, but who have been told by Supreme Court guards that they may take notes during Court sessions so long as they do so "discreetly"); and it has never been challenged in any legal proceeding.

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Aside from a number of well-known cases related to the use of television cameras, issues related to access to the courtroom have arisen relatively rarely in litigation in the United States. Such cases that have arisen in the United States differ from the Japan Courtroom Notes Litigation in three significant respects. There is no case in which a court in the United States has imposed limitations on courtroom observers which would serve as a precedent justifying the types of limitations which have been upheld in the December 25, 1987 decision of the Tokyo High Court.

First, all the American cases have involved unusual circumstances not present in the Japanese case--for example, children as witnesses, or intimate family relations as the subject of the dispute.

Second, in all these cases, the litigants themselves have sought to limit courtroom access to the public or its representatives, the press. To the best of our knowledge, no order limiting public or press access to a courtroom has been issued by a judge in the United States unless it was requested by the parties. In contrast, as we understand it, the criminal defendants in the Japanese Courtroom Notes Litigation have not protested the presence of note takers in the courtroom (in addition to the special group of authorized reporters). In fact, you have informed us that both attorneys for the prosecution and the defense were contacted in the case that you attended and that neither had any objection to your note taking as a spectator.

Third, to our knowledge, no litigated case in the United States has ever involved the simple act of taking notes. This no doubt reflects the fact that the mere taking of notes can hardly be said to be disruptive of the proceedings.⁴ Rather, in the U.S. context, courts have on occasion limited access of noisy, more obtrusive techniques for recording the proceedings: television and photography. Notwithstanding the admittedly disruptive potential which such equipment might have on judicial proceedings, the U.S. courts have granted great latitude to their courtroom operation, in recognition of the importance of the

⁴ The Japanese courts evidently recognize this fact by allowing a select group of reporters to attend and take notes. It is hard to believe that if the minimal motions and sounds caused by several pens moving against several notepads were multiplied by the addition of a few more pens and notepads, this would increase the motion or noise level to one that could fairly be considered disruptive.

public's right to accurate and complete information about judicial proceedings.⁵ Many courts throughout the United States now routinely permit the televised broadcasting of their proceedings. Likewise, the ACLU has formulated a policy which presumptively permits broadcasting and photographing of trials.⁶

⁵ See, e.g., Chandler v. Florida, 449 U.S. 560 (1980) (holding that an absolute constitutional ban on broadcast coverage of criminal trials cannot be justified simply because there is a danger that, in some cases, the broadcasting may adversely affect the defendant's right to a fair trial; the appropriate safeguard is the defendant's right to demonstrate that the media's coverage of his case compromised the ability of the particular jury hearing his case to adjudicate it fairly). See also Estes v. Texas, 381 U.S. 532 (1965).

⁶ The core principles of this policy are set forth in this footnote. The entire policy is contained in Appendix A to this letter.

In the past, the technological state of television, broadcasting and photographic equipment was such that its use in the courtroom almost necessarily caused an intrusion on court proceedings. Recent technological advances, however, now make it possible for such coverage to be conducted in a manner which does not significantly intrude into or distract from the proceedings.

The decision whether to permit television or photographic proceedings at the trial level requires sensitive balancing by the court of the public's interest in observing such events against the risk that the presence of television or photographic cameras may jeopardize the interest of fair trial or due process in the particular case. Feared publicity affecting jurors, feared reprisal against witnesses exposed to T.V. coverage and "showboating" for the camera by the judges, attorneys or witnesses are all possible results of electronic coverage which could affect the outcome of certain trials.

Therefore, although the electronic media should generally enjoy parity of treatment with the print media, in some situations the electronic media's potential for serious adverse impact on legitimate interests to a fair trial may be so substantial as to warrant different or greater restrictions on the

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In each of these cases, the United States court was required to balance the right of expression against another right, most commonly, the right to a fair trial. Restriction of the right of expression could only be allowed upon a specific finding that the act of expression caused unavoidable injury to another protected interest of equal or greater importance, such as the right to a fair trial. The Tokyo District Court decision which prohibited you from taking notes did not state any reasons for its action and did not identify any injury to another interest such as the right to a fair trial. Furthermore, you have informed us that you made numerous written requests to take notes, utilizing forms provided by the Tokyo District Court for this purpose, but in each case the court summarily rejected your requests without stating any reason.

Indeed, in contrast to the questions presented in relation to the issues of allowing broadcasting and photographs in courtrooms, the unobtrusive act of note taking is viewed as having so little potential for disruption of courtroom activities that the ACLU has never found any need to adopt an express policy stating that reporters and others present in a courtroom have the right to take notes. Like other basic and widely accepted civil liberties principles (such as the privilege against self-incrimination), the ACLU recognizes this right as part of its unwritten "common law" or "core" policies--~~that is~~, those deemed so central and so self-evident that there is no need to record them in formal policy statements.

The ACLU has consistently deemed the right to attend and take notes at judicial proceedings as particularly important because it provides an essential foundation for the protection of other significant civil liberties. Among the numerous other rights which depend in large measure upon courtroom notetaking are: the right to fair trials conducted by an independent

electronic media. Such interests may include the desire of a rape victim or victim of abuse by family members to remain anonymous.

The Union believes, however, that, on the whole, televising and photographing of judicial proceedings enhances the exercise of First Amendment rights and the public understanding of the law and the legal process, improves the judicial process and, except in the specific instances delineated in this policy, should be supported by ACLU.

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judiciary; the right to due process of law in both civil and criminal cases; the right, in criminal cases, to be represented by competent counsel, to be confronted by adverse witnesses, to exercise the privilege against self-incrimination, and not to be prosecuted on the basis of illegally obtained evidence, including involuntary confessions and evidence secured through unreasonable searches or seizures.

Stated generally, for citizens in a democratic society to protect and exercise their rights against government officials, they must be aware of the activities of those officials. Because the courts constitute major forums in which government policy is formulated and executed, it is as important that the public be kept fully informed of government actions in judicial forums as it is that the public be kept apprised of government actions in legislative or executive forums.

We recognize that the Tokyo High Court decision does not completely eliminate the possibility that, on occasion, courtroom observers other than certain selected reporters might be permitted to take notes. Nevertheless, this decision is clearly in conflict with fundamental tenets of American constitutional law, endorsed by the ACLU as basic civil liberties principles. The Tokyo High Court decision does not attempt to balance the spectator's right to take notes against the need for courtroom order. Instead, the possibility that certain selected reporters might be allowed to take notes is left entirely in the court's discretion, and the judges are allowed to exercise that discretion for any reason--or, in effect, for no reason.

In stark contrast with the American precedents, which begin with a strong presumption that courtroom reporting will be allowed, and permit the banning from the courtroom even of television cameras only upon a strong, specific showing that disruption is highly likely to occur, the Tokyo High Court decision tilts this presumption and burden of proof the other way. This decision allows a court to prohibit notetaking when "there is even a slight possibility that influence may be exerted upon the fair and smooth conduct of the trial . . ." Such unfettered discretion is tantamount to permitting each judge to bar notetaking in all cases, ~~absent~~ ^{without} any evidence of actual

7 Many of the foregoing rationales for a strong presumption in favor of open trials, at which members of the press and public may take notes, have also been cited in Supreme Court decisions upholding the public's and press's right of access to criminal trials. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 at 563-75 (1980).

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disruption. Surely, in every case, a judge could surmise the requisite "slight possibility" that [disruptive] influence may be exerted."

Another aspect of the Tokyo High Court's decision is inconsistent not only with free speech principles of U.S. jurisprudence, but also with the U.S. constitutional guarantee of equal protection of the laws (set out in the Fourteenth Amendment). This is the Court's ruling that it is appropriate to allow one portion of the public -- a small, select group of reporters employed by large national news organizations -- to take notes, while all other persons are prohibited from doing so.

Under U.S. constitutional law and civil liberties principles, the right to attend and take notes has always been recognized as a right of the public, to be exercised either individually or through members of the press. The press has never been considered to have rights greater than or different from members of the general public. Further, persons who exercise this right have never been required to make any showing of special qualification, competence, on any other matter as a condition to its exercise.

The Tokyo High Court attempts to justify its preferential treatment of a select group of reporters through its assumption that more people will read the writings of this specially privileged category of reporters, in contrast with the writings of all other potential courtroom note takers. But the size of the audience for a communication or act of expression has never been a criterion for determining whether it is protected under American constitutional principles. Indeed, freedom of expression is guaranteed -- and, the ACLU submits, should be guaranteed -- for any person even if s/he has no audience for such expression.

The American constitutional law and civil liberties principles relevant to the Courtroom Notes Litigation can be summarized as follows. The right to a public trial means that trials must be held in public and therefore that the courtroom is a public place. The act of taking notes is a primary and essential element of free expression. This act could be properly restricted in a public place such as a courtroom in only the most extreme circumstances. There has been no litigated case in the United States which has demonstrated such extreme circumstances and we find it hard to imagine any such circumstances. In a case such as the Courtroom Notes Litigation, where both prosecution and defense attorneys have agreed that you may take notes, the requisite extreme circumstances are plainly lacking.

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For the foregoing reasons, we conclude that under the U.S. constitutional counterpart of Japanese Constitution Article 21, as interpreted by the U.S. Supreme Court, the discretionary power which the Tokyo High Court decision vests in judges to prohibit courtroom note taking would be found unconstitutional. It would also violate ACLU policy in this area, with which the relevant Supreme Court decisions are essentially consistent.

We hope this letter has provided the information you requested. Please let us know if you would like further information about U.S. law or ACLU policy concerning the vital right to take notes in judicial proceedings.

Very truly yours,



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Policy #224

Broadcasting and Photographing of Judicial Proceedings

(a) Introduction

The right of the media to report news to the public, the right of the public to be informed about and observe judicial proceedings, and the right of all persons to a fair trial and protection against unwarranted invasion of privacy are each vital constitutional and civil liberties concerns.

In the past, the technological state of television, broadcasting and photographic equipment was such that its use in the courtroom almost necessarily caused an intrusion on court proceedings. Recent technological advances, however, now make it possible for such coverage to be conducted in a manner which does not significantly intrude into or distract from the proceedings.

The decision whether to permit television or photographic coverage of proceedings at the trial level requires sensitive balancing by the court of the public's interests in observing such events against the risk that the presence of television or photographic cameras may jeopardize the interests of fair trial or due process in the particular case. Feared publicity affecting jurors, feared reprisal against witnesses exposed to TV coverage, and 'showboating' for the camera by the judges, attorneys or witnesses are all possible results of electronic coverage which could affect the outcome of certain trials.

Therefore, although the electronic media should generally enjoy parity of treatment with the print media, in some situations the electronic media's potential for serious adverse impact on legitimate interest to a fair trial may be so substantial as to warrant different or greater restrictions on the electronic media. Such interests may include the desire of a rape victim or victim of abuse by family members to remain anonymous.

The Union believes, however, that, on the whole, televising and photographing of judicial proceedings enhances the exercise of First Amendment rights and the public understanding of the law and the legal process, improves the judicial process and, except in the specific instances delineated in this policy, should be supported by ACLU.

* * *

(b) Restrictions Applicable to Broadcasting, Televising and Photographing of Pretrial and Trial Proceedings
Courts should regulate television, broadcast and

¹ This policy applies to judicial proceedings, both civil and criminal, which are public. Juvenile, family, domestic relations, guardianship and competency hearings involve considerations that this policy does not address; therefore, this policy may not be applicable to those proceedings.

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photographic coverage of courtroom proceedings to ensure that such coverage is unobtrusive to the proceedings. In administering such restrictions, courts may require all broadcasters to operate through a single camera and through minimal sets of microphones and otherwise limit photographic equipment in the courtroom. Such limitations, however, must be applied so that all news reporters have equal access to the output from the limited equipment permitted in the courtroom.

In addition, because there are qualitative differences between coverage of judicial proceedings by the written press and television, broadcasting and photographic coverage, restrictions which arise out of that difference may selectively be applied to the latter which may be inapplicable or inappropriate to the former. Any such restrictions must be based only upon findings, specific to the proceeding and persons at issue, made on the record and based on clear and convincing evidence that such coverage would probably:

- 1) substantially interfere with the fairness of the proceeding; or
- 2) increase the possibility of personal danger to the health or safety of one or more particular individuals; or
- 3) increase the legitimate fear of witness of retribution by those against whom they are giving evidence -- for example, fair trial and due process interests justify restrictions on televising, broadcasting or photographing portions of a trial where, because of such coverage, a witness refuses to testify and such testimony is material to either side of the case and alternative methods of obtaining such testimony are unavailable; or
- 4) invade privacy interests of specific trial participants which are so compelling as to outweigh the public's right to know by means of television, broadcast or photographs.

* * *

(c) Standards and Procedures Applicable to Imposing Restrictions on Broadcasting, Televising and Photographing of Pretrial and Trial Proceedings

In determining whether there is clear and convincing proof that one of the interests described in (b) will be so materially

¹ This section does not deal with limitations on media access to the courtroom or selected courtroom proceedings or portions thereof which are based on a compelling need to restrict the flow of information to protect an interest that would be impaired by the mere fact of disclosure. Such limitations necessarily apply to both print and electronic media. Examples of these bases for restrictions are: a) personal danger, such as fear of state informers of retribution by those against whom they are giving evidence; b) right to a fair trial, such as a witness' refusal to testify because of other media coverage; c) certain proprietary right such as economic rights, trade secrets, etc.

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and adversely affected as to justify imposing restrictions on the broadcasting, televising and photographing media's courtroom access or coverage, the court shall place the burden of proof on the proponents of media restriction to show that their privacy or fair trial interests warrant protection and that such restriction is a least restrictive way to achieve it.

Media representative should have standing to participate in the proceeding to consider restrictions and a right to a prompt appeal. In making its determination, the court in all instances should employ the least restrictions against the media required to serve the competing interests raised by trial participants.

* * *

(d) Criminal Defendants' Veto on Broadcasting, Televising and Photographing of Pretrial and Trial Proceedings
Notwithstanding the general policy stated above, because of the constitutional rights of defendants in criminal proceedings, ACLU believes that defendants should have an absolute right to veto use of television, radio broadcasting or photographic equipment during their pretrial or trial proceedings. This would not interfere with attendance of broadcast media representatives at the proceeding or with their contemporaneous reports of the proceedings over the broadcast media.

* * *

(e) Rights of Jurors with Respect to Televising, Broadcasting or Photographing Judicial Proceedings
A juror on voir dire may be asked if he or she would be affected by the presence of television, broadcast or photographic coverage in the courtroom, but once empaneled, jurors may not raise objections to such coverage.

* * *

(f) Media Coverage of Appellate Proceedings
There should be no prohibition on electronic media coverage with respect to appellate proceedings, as long as such coverage is physically unobtrusive.

* * *

(g) A party in a civil or criminal proceeding should have the right, at his or her expense, to record electronically the proceedings in accord with the procedures of this policy. [Board Minutes, October 20-21, 1984, April 12-13, 1986.]