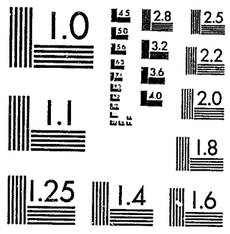

Department of Justice

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

EXAMINATION OF PROSPECTIVE JURORS

ON

MARCH 7, 1984

Mr. Chairman and members of the Subcommittee, I am pleased to be here today to express the views of the Department of Justice with respect to parallel bills, S. 386 and S. 677, which would amend the Federal Rules of Criminal (S. 386) and Civil (S. 677) Procedure dealing with the examination of prospective jurors in civil and criminal cases in the federal court system. The Department of Justice strongly opposes enactment of these bills. Our reasons have largely been communicated to the Subcommittee in prior comments on these and predecessor measures, but I am glad to have the opportunity to reiterate and elaborate upon our position in person in light of the dramatic -- and in our view unwarranted -- change in federal practice that these bills would bring about. My remarks will focus on the effect of the proposed change in criminal cases, but are equally applicable to the parallel proposal for a change in the civil rules as well.

Currently, Rule 24(a) of the Federal Rules of Criminal Procedure provides that the court may conduct the examination of prospective jurors (the "voir dire"), or may permit the government attorney and the defense counsel to do so. If the court conducts the voir dire, the government and the defense attorneys may perform such supplemental examination as the court deems proper, or submit additional questions to the court for the court to consider asking the jurors. Thus, at present, the extent of the government's and the defense's participation in the voir dire is controlled by the court in the exercise of its discretion. A similar civil rule (Rule 47(a), Federal Rules of Civil Procedure) governs the conduct of the voir dire in civil cases.

S. 386 would amend Rule 24(a), F.R.Crim.P., to require the court to permit the defendant or his attorney, and the attorney for the government, to conduct the voir dire. The court could then conduct additional examination. The court would be authorized to impose such reasonable limitations as it deemed proper on the examinations by the defense and the government, except that each side would be entitled to not less than thirty minutes for the voir dire. In cases involving multiple defendants, the attorneys for the defendants would be allowed an additional ten minutes for each additional party, except that the total minimum time allowed each side could not exceed one hour.

At present, although the Rules permit federal judges to allow counsel for the parties to conduct voir dire examinations, the vast majority of federal judges have for years preferred to conduct the voir dire themselves. We believe that this prevailing practice has proven to be fair and economical. Moreover, based on the problems of certain States, in particular that of my native California, which operates under a rule (like that proposed in S. 386 and S. 677) placing counsel in charge of conducting voir dire examinations, the Department of Justice is seriously concerned that adoption of this approach within the federal justice system would be a grave and costly mistake.

Central to our position with regard to the pending bills S. 386 and S. 677 is our belief that the present system works well and provides wholly adequate assurances against juror bias. As former Assistant Attorney General Rose pointed out, in

testifying before this Subcommittee on this issue in 1981, such assurances are especially important in criminal cases. The federal courts, however, have long interpreted Rule 24(a) so as to recognize the right of a federal criminal defendant to an impartial jury. The Supreme Court has noted that the trial judge's exercise of its traditionally broad discretion over the voir dire, and the restriction of examination by or at the request of counsel, are subject to "the essential demands of fairness,"[1] and has further held that trial judges must conduct or permit sufficient examination to provide a reasonable opportunity for counsel to exercise peremptory challenges in a meaningful way.[2] The courts of appeals have also held that the voir dire must be conducted in such a way as to afford a "reasonable assurance that [a prospective juror's] prejudice would be discovered if present."[3] Thus in our view the current system provides the essential guarantees of fairness. Moreover, while we are aware of the claims of proponents of an attorney-controlled voir dire process that attorneys are more suited to discover bias than judges, because of their familiarity with the case and because as adversaries they are likely to probe more deeply than

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1 Aldridge v. United States, 283 U.S. 308, 310 (1931).

2 Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion).

3 United States v. Magana-Arevalo, 639 F.2d 226, 229 (5th Cir. 1981).

judges, we are unaware of any serious allegation or evidence that the prevailing federal practice fails adequately to elicit bias or denies the parties the right to an impartial jury.

On the other hand, attorney-conducted voir dire suffers from many actual and potential pitfalls. Attorneys may and do abuse voir dire in a variety of ways, for example by using it to question jurors beyond the proper limits of privacy,[4] to engage in personality contests with opposing counsel, or to subtly influence jurors. In addition, and of primary concern at a time when swollen dockets and court delays are a major problem in virtually every jurisdiction, including the federal sphere, it seems clear that the federal method of conducting voir dire yields substantial savings in time when compared with a system in which counsel control the process. As pointed out previously in our testimony in 1981, this has been the conclusion of many empirical studies and commentators,[5] and recent experience in two States, New York and california, amply attests to this proposition. Indeed, we see in the experience in these jurisdictions the realization of the fear we share that a counsel-controlled process of voir dire examination may well run rampant.

A November 1982 study of the New York State Executive Advisory Commission on the Administration of Justice found that jury selection in New York City's over-clogged courts, under a

4 See United States v. Barnes, 604 F.2d 121, 143 (2d Cir. 1979).

5 E.g., Levit, Nelson, Ball & Chernick, Expediting Voir Dire: An Empirical Study, 44 S. Cal. L. Rev. 916 (1971).

rule entitling lawyers, rather than the judge, to control the voir dire process, consumed up to a third of total trial time in New York City. The Commission concluded that switching to the present federal rule "could create trial time savings equivalent to the work product of 26 additional judges", noting that its survey found that the average time spent in jury selection under the federal rule was approximately one-fifth that consumed under the present New York State rule.[6] Significantly bills, supported by Governor Carey and the Mayor of New York City, to adopt the federal concept of judge-controlled voir dire, are currently pending in the New York State legislature.

This New York initiative is reflective of a recent trend away from attorney-conducted and toward judge-conducted voir dire. Whereas traditionally the questioning of jurors during voir dire was left to attorneys, as of 1980 only nineteen States allowed attorneys to exercise primary control over the voir dire in civil and criminal cases.[7] The same trend is evident in the federal system. Whereas in 1970 a report revealed that under the discretionary provisions of the Federal Rules only 56% of the federal judges indicated that they conducted the voir dire without participation by counsel, a 1977 Federal Judicial Center study (the most recent available according to our information) showed that "approximately three-fourths of federal judges

6 Recommendations to Governor Hugh L. Carey Regarding Proposals for Jury Selection Reform 1-7 (1982).

7 Suggs & Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L. J. 245, 250-251 (1981).

conduct voir dire without oral participation by counsel."[8] Thus the bills before the Subcommittee would point the federal system in a direction opposite from that in which, on the basis of recent experience, most jurisdictions are moving.

The experience in California with counsel-controlled voir dire examination is even more illuminating. A Los Angeles Times article of February 14, 1984, reported that it recently took nine months and 129 court days to select a jury in a murder prosecution. Another murder case in 1981 involving the ambush of a sheriff's deputy consumed 82 court days. While these instances may be extreme, the trend they exemplify of excessive use or abuse of the jury selection process in California is, in my experience, real and increasing. Indeed, it is not uncommon in California for jury selection even in misdemeanor cases to consume many days.

In January 1984 the United States Supreme Court decided a case involving a murder prosecution arising from the California State system in which, although unrelated to the question presented for decision, the Court noted, with apparent amazement, that the voir dire "consumed six weeks" (emphasis in original).[9] This prompted the Court to observe in a later footnote that "a

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8 Ibid. See also G. Bermant, Conduct of the Voir Dire Examination 6 (Fed. Jud. Center Pub. 1977).

9 Press-Enterprise Co. v. Superior Court of California, Riverside County, __ U.S. __ (decided January 18, 1984 (slip op. p. 1).

voir dire process of such length, in and of itself undermines public confidence in the courts and the legal profession."[10] The Court went on to state in the same footnote:

> The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure that privileges are not so abused.***

We concur with the Supreme Court's pronouncement stressing the importance to the administration of justice of a court-controlled voir dire system. While we recognize that S. 386 and S. 677 allow the court to impose reasonable limitations with respect to the examination of prospective jurors, the same is true as a matter of law under those States like New York and California presently operating under comparable rules. The experience in many of those States is that judges often decline to exercise their powers to restrain the conduct of the voir dire by counsel within reasonable bounds for fear of committing error that may lead to reversal, or for other reasons. We are apprehensive that a similar phenomenon, leading to abuses and unrestrained exploitation of the jury selection process, would occur in the federal court system if legislation like S. 386 and S. 677 were enacted.

Any such importation of the California or New York experience with counsel-controlled voir dire into the federal system would be disastrous. We are informed by the Administrative Office of United States Courts that for the year ending June 30,

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10 Id. at p. 8, fn. 9.

1983, a total of 316,821 jurors were present in federal court for selection or orientation, and a total of 9769 juries were selected.[11] The already strained federal judicial system clearly cannot cope with massive delays in the selection process such as might well be occasioned by a change in practice to a counsel-controlled examination of prospective jurors. Even if these dangers were thought to exist only with respect to so-called "big" cases, it should be remembered that the federal system, at least in litigation involving the United States as a party, probably includes a far higher percentage of major cases than are filed in most State jurisdictions. While we cannot predict that enactment of bills such as S. 386 and S.677 would inevitably produce the worst sort of consequences, we do not believe either that their enactment holds the promise of substantial improvement in the voir dire system sufficient to assume that formidable risk.

In sum, the Department of Justice is cognizant of the concerns of some segments of the defense bar regarding the importance of voir dire and of their belief that permitting counsel to conduct examination of prospective jurors would result in a more thorough examination and could help to assure maximum guarantees against juror bias. However, for the reasons indicated and based on the experience of States which follow such a

[11] Actual jury trials in the same period numbered 8629, of which 5064 were in civil cases and 3565 were in criminal cases. About 1100 cases appear to have been disposed of by plea or settlement following jury selection.

practice, we have concluded that changing the current federal rules so as to mandate a counsel-controlled voir dire process would be counterproductive and unwise. Such a change would undoubtedly make trials substantially longer, greatly increase the cost to the taxpayer in civil and criminal cases in which the government is a party (particularly criminal cases in which defense counsel is appointed), further burden the judicial system, and undermine public confidence in the system. These costs and effects would be incurred despite the fact that the present system works well and includes adequate assurances against juror bias. Accordingly, we oppose the enactment of S. 386 and S. 677.

Mr. Chairman, that completes my prepared statement and I would be happy to try to answer any of the Subcommittee's questions.

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