

## Symposium Introduction: Privacy in the Federal Courts

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The essays and articles in this symposium issue are based on the presentations and panel discussions held on April 11, 2008 at the Charleston School of Law. The symposium was sponsored by the Federal Courts Law Review in conjunction with the Federal Magistrate Judges Association and the Federal Bar Association, South Carolina Chapter, and focused on privacy issues generally, including those arising from advances in technology and the ubiquity of the internet.

The keynote speaker for the symposium was Arthur R. Miller, and his speech is reproduced for this edition. Professor Miller questions whether there is any privacy left in our current society—where information is generated constantly and kept seemingly forever. In the “metaphorical fish bowl” that is our modern lives, every action we take contributes to the informational dossier that is then used by others to make decisions with real implications for everyday activities—our ability to get a loan, to go through airport security, to get into law school. After forty years of thinking about privacy and the effects of government action on our civil liberties, Professor Miller notes how little has changed: “For Vietnam, read Iraq or the War on Terror. For the Army, read the National Security Agency, or the FBI, or the Department of Homeland Security. For the 1970s covert open-air surveillance techniques, read today’s monitoring of telephone calls and computer files (data mining).”

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1. Associate Professor of Law, Charleston School of Law. The success of this symposium is thanks in large part to the faculty, staff, administration, and founders of the Charleston School of Law, as well as to the efforts of the symposium participants. Thanks also to the dedication of the editors and staff of the *Federal Courts Law Review*, and the support of the Federal Magistrate Judges Association and the Federal Bar Association, South Carolina Chapter.

Privacy remains, as it has since Brandeis's day,<sup>2</sup> at the top of society's "hierarchy of concerns," but our ability to protect information about ourselves is reduced to the point of disappearing.

The second article is by Professor Robert E. Mensel, who looks at the origins and uses of the right to privacy in the federal courts and concludes that privacy was often used in opposition to progressive reform. The right to privacy arose "as a reaction to the general inquisitiveness and intrusiveness of middle class society" during the Progressive Era. Interestingly, privacy as a value developed into a shield that federal judges used in an attempt to protect the institutional competency of the courts and the proper administration of justice against the threat of progressive reform legislation. The liberalization of the Supreme Court ended the long battle between privacy and reform, "and the right to be left alone was radically reduced."

In its modern application, the right to privacy can be seen, on one hand, as a means of protecting one's identity and personality against the intrusiveness of the information age and, on the other, as a threat to our ability to protect the security of our nation and the open operation of our court system.

Participants at the privacy symposium sat in panels, the first<sup>3</sup> of which took up the effects of secret settlements on the furtherance of justice. In particular, they questioned whether confidentiality truly affects parties' incentives to settle cases, whether restricting a plaintiff's lawyer's legal representation in future cases against the defendant—as a condition of settlement—is against public policy, and what standards of good cause a court should consider in deciding whether a court-sponsored settlement agreement should be sealed.

In addition, Panel I considered the issue of juror privacy. Juror questionnaires often seek highly personal information, including information about health, religion, and criminal activity, in addition to personal information that can be used by identity thieves. The panelists asked how courts might protect the privacy of that information, how anonymous juries might properly be used, and how

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2. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3. Panel I included the Honorable Joseph F. Anderson, Jr., District Judge for the District of South Carolina, the Honorable Valerie P. Cooke, Magistrate Judge for the District of Nevada, the Honorable Sam A. Joyner, Magistrate Judge for the Northern District of Oklahoma, and the Honorable Karen K. Klein, Magistrate Judge for the District of North Dakota. It was moderated by Professor Allyson W. Haynes.

to strike the proper balance between juror privacy and the public's right to open court proceedings.

Finally, Panel I considered the implications of privacy in electronic discovery issues. The changes in the electronic discovery rules and the increase in electronic discovery in general raise privacy issues for potential litigants, in that certain forms of communication they may think of as private are in fact subject to legitimate discovery requests.

In contrast to the focus on secrecy of trial proceedings themselves, Panel II<sup>4</sup> addressed the broader privacy implications of online access to court records. The move toward such online access raises serious privacy issues, as court records relating to sensitive domestic and financial issues are more readily available and capable of dissemination online. These concerns were the focus of the 2001 Judicial Conference privacy policy,<sup>5</sup> which resulted in amendments to the federal appellate, bankruptcy, civil and criminal rules, requiring the redaction of personal identifier information from filings.<sup>6</sup>

In the third article of this edition, Peter Winn tracks the history of on-line access to court records from the open "ceremonial space" of Westminster Hall to modern American courtrooms with their spectator pews. The case law reflects a nuanced view of the balance required between transparency of court proceedings and individual privacy, with courts granting public access "when the underlying purpose is to ensure the integrity of the judicial process," but remaining "quick to protect personal information" when that purpose is "unrelated to public oversight of the judicial system." The advent of online access to judicial records has laid bare the way that "practical obscurity" kept private much information that was technically open to access but required legwork and costs to retrieve.

Professor Winn also analyzes the privacy amendments to the Federal Rules of Procedure, intended to address concerns about privacy and confidentiality in response to the PACER system, and

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4. Panel II included the Honorable Boyd N. Boland, Magistrate Judge for the District of Colorado, the Honorable Lorenzo F. Garcia, Magistrate Judge for the District of New Mexico, and the Honorable James P. O'Hara, Magistrate Judge for the District of Kansas. It was moderated by Peter A. Winn, Assistant United States Attorney and Adjunct Professor at the University of Washington School of Law.

5. Judiciary Conference of the United States, 01 Sept./Oct. 48-50; Judiciary Conference of the United States, 03 Sept. 15-16; *available at* <http://www.privacy.uscourts.gov/Policy.htm>.

6. *See* Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. App. P. 25; Fed. R. Bank. P. 9037; *see also* E-Government Act of 2002, PL 107-347, 2002 HR 2458.

finds that they “represent an important step” in addressing privacy concerns introduced by electronic access. He determines that “[w]hile the new system of electronic information may provide less protection for privacy than in the past, it also provides new opportunities for the implementation of audit and oversight of its records—so that information management can take place far more efficiently than ever before.” He advocates the exercise of such oversight by the Administrative Office of the U.S. Courts, which could, among other things, require that companies providing data aggregation services “adhere to the same principles of information management as apply to the courts.” Fundamentally, “information management policy should focus on encouraging public participation in the judicial process and discouraging practices which undermine the administration of justice.”

The final panel<sup>7</sup> of the symposium focused on privacy issues in criminal proceedings. While technological advances have greatly enhanced the effectiveness of law enforcement efforts, they have also given rise to more intrusive surveillance techniques that challenge our conceptions of privacy. The panelists discussed the implications of modern pen registers, trap and trace devices, wiretaps, and video surveillance on the right to privacy.

In the final article of this edition, Judge Stephen Wm. Smith analogizes the growth of secrecy in the courts to the spread of the kudzu vine throughout the American South. Historically, American courts have followed the English common law tradition whereby the court system operates in view of the public. There is an important reason for this traditional openness: “Most fundamentally of all, publicity conferred legitimacy upon court judgments.” But beginning in the first half of the twentieth century, court decisions and legislation began to carve out exceptions to the general rule of public access to judicial records and proceedings. Like the kudzu vine that spread across farmlands, concealing whatever was underneath, the spread of the judicial use of sealed warrants and electronic surveillance orders as well as judicially-enforced secrecy of settlements conceal the inner workings of the court and threaten the system’s very legitimacy.

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7. Panel III included the Honorable William E. Callahan, Magistrate Judge for the Eastern District of Wisconsin, the Honorable Robert B. Collings, Magistrate Judge for the District of Massachusetts, and the Honorable Stephen Wm. Smith, Magistrate Judge for the Southern District of Texas. It was moderated by Miller W. Shealy, Jr., Assistant Professor at the Charleston School of Law.

As the world grows increasingly technologically savvy and dependent upon online access to information, these important issues will continue to arise, and will undoubtedly arise in new and as yet unexpected ways. Our federal system is only beginning to respond to the effects of the internet on the age-old dilemma of public access versus personal privacy. Symposia like ours are an important venue for judges, scholars, practitioners, and students to debate the issues and consider possible solutions. We at the Charleston School of Law and the Federal Courts Law Review sincerely hope our efforts have shed light on the nature of the interests at stake, and have raised at least a glimmer of hope that a reasonable and appropriate balance might be reached.