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In re: Report on Privacy & Electronic Access to Court Records

THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS THE REPORT AND RECOMMENDATIONS OF THE JUDICIAL MANAGEMENT JUSTICE LEWIS JOINED US. JUDGE GRIFFIN, YOU MAY PROCEED.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM JACKIE GRIFFIN, ONE OF THE JUDGES ON THE FIFTH DISTRICT COURTS OF APPEAL AND ALSO IN A MANAGEMENT CAPACITY, I WAS ASKED TO SERVE AS THE CHAIR AFTER WORK GROUP, WHOSE TASK IT WAS TO CONSIDER THE EMERGING PROBLEM OF THE QUESTION OF PROVIDING INTERNET ACCESS TO COURT RECORDS. IN THE COURSE OF DOING THAT OR AS THE RESULT OF DOING THAT OVER AN EXTENDED PERIOD OF TIME, WE HAVE PRODUCE ADD REPORT AND RECOMMENDATIONS WHICH IS IN YOUR HANDS FOR CONSIDERATION TODAY. THE REPORT, ITSELF, DETAILS THE VARIOUS ACTIVITIES THAT WE UNDERTOOK, IN ORDER TO TRY AND MAKE AN ADVISED DETERMINATION AND MAKE RECOMMENDATIONS TO THE COURT, THAT INCLUDED AN EXAMINATION OF WHAT OTHER JURISDICTIONS ARE DOING AND ATTEMPTING TO ACCESS ALL OF THE SCHOLARLY INFORMATION THAT IS CURRENTLY AVAILABLE ON IT POINT, AS WELL AS ATTEMPTING TO DEVELOP AT LEAST A RUDE AMOUNT OTHER UNDERSTANDING -- A RUDE A MEANT OTHER UNDERSTANDING OF -- A RUDAMENTARY UNDERSTANDING OF WHAT IS INVOLVED.

HAS THE COMMITTEE LOOKED AT THE REPORTS SINCE THEY WERE PUBLISHED?

THE COMMITTEE HAS NOT DONE SO AS A BODY, BUT I HAVE RECEIVED THEM AND I HAVE REVIEWED THEM.

PART OF YOUR PRESENTATION TOUCH ON THOSE COMMENTS THAT WERE MADE?

JUSTICE QUINCE, IT HAD NOT BEEN MY INTENTION TO ADDRESS THEM DIRECTLY. AM HAPPY TO ANSWER ANY QUESTIONS THAT YOU MIGHT HAVE.

JUDGE GRIFFIN, HASN'T MUCH OF WHAT HAS HAPPENED BEEN, IN EFFECT, TAKEN CARE OF BY LEGISLATION?

WELL, I DON'T KNOW THAT IT HAS BEEN TAKEN CARE OF, BUT IT CERTAINLY HAS --

OR BEEN ADDRESSED BY LEGISLATION.

EXACTLY. THE REPORT THAT, AND RECOMMENDATIONS THAT WE PROVIDED ESSENTIALLY CONTAINED TWO RECOMMENDATIONS. ONE, THAT A COMMITTEE OR A COMMISSION THAT IS EXTREMELY BROADLY BASED, BE CREATED UNDER THE AUSPICES OF THE JUDICIAL MANAGEMENT COUNSEL -- COUNCIL, TO THOROUGHLY CONSIDER IN ISSUE AND TO RERMD TO THE COURT, CERTAIN -- AND TO RECOMMEND TO THE COURT, CERTAIN POLICY OR POLLS FOR ADOPTION THAT MIGHT INCLUDE PROPOSED RULES AND/OR DEVELOP THE NEED FOR FURTHER LEGISLATION. AND THE SECOND THING THAT WE HAVE RECOMMENDED IS THAT THE CLERKS OF THE COURT BE DIRECTED NOT TO PUBLISH COURT FILES ON THE INTERNET, UNTIL THIS ANALYSIS IS COMPLETE AND THE POLICIES ARE IN PLACE. AND I HOPE THE REPORT IDENTIFIES SUFFICIENTLY, THE REASONS WHY WE HAVE MADE THOSE RECOMMENDATIONS.

WHAT IS YOUR THOUGHT ABOUT WHETHER, NOW THAT THE LEGISLATURE HAS ACTED IN TERMS

OF SETTING UP A GROUP THAT IS GOING TO EXAMINE SOME OF THESE ISSUES, THAT, WHAT A GROUP APPOINTED BY THE COURT, BY THE CHIEF JUSTICE WOULD BE DID YOU POLICE TUESDAY?

-- WOULD BE DUPLICITOUS.

I DON'T BELIEVE IT WOULD BE A DUPLICITIOUS OR DUPLICATIVE EVENT, FOR THIS COURT TO UNDERTAKE THE STUDY OF THE MATTER, THEMSELVES. I THINK IT IS APPLICABLE THAT THIS COURT INDEED THIS QUESTION AND ATTEMPT TO RECEIVE, FROM SOURCES OF ITS OWN THE BEST SOLUTION TO THIS PROBLEM IS. THE LEGISLATION THAT HAS BEEN REFERRED TO BY JUSTICE HARDING, IS LEGISLATION JUST ENACTED, WHICH IS, WHICH HAS GOT NUMBER, HOUSE BILL 1679 TO IT, AND IF THERE ARE ANY MEMBERS OF THE COURT THAT ARE NOT ALREADY FAMILIAR WITH IT, I WILL BE HAPPY TO DETAIL IT. ESSENTIALLY WHAT IT DOES IS IT CREATES A COMMISSION TO, CALLED A STUDY COMMITTEE ON PUBLIC RECORDS, BUT IMPORTANTLY FOR THE LEGISLATION, IS THAT THE FIRST SEVERAL OF ITS RECOMMENDATIONS OR THE FIRST SEVERAL OF THE ISSUES THAT ARE IDENTIFIED FOR THIS COMMITTEE TO CONSIDER, RELATE SPECIFICALLY TO COURT RECORDS, AND THE CONFIDENTIALITY OF COURT RECORDS, AND HOW INTERNET ACCESS WOULD AFFECT THOSE COURT RECORDS, AND A COMMITTEE HAS BEEN DETAILED AS TO HOW IT WOULD BE ESTABLISHED, WHO WOULD MAKE THE POINTS. THE COURT, FOR EXAMPLE, HAS THE POWER TO APPOINT TWO JUDGES AND ONE ADVISORY MEMBER.

DO YOU SEE, IF WE ACCEPT YOUR RECOMMENDATION THAT THE COURT APPOINT ITS OWN COMMITTEE, DO YOU SEE THAT COMMITTEE GOING BEYOND THOSE ISSUES THAT ARE OUTLINED IN THE LEGISLATION THAT THE LEGISLATIVE COMMITTEE WILL BE ADDRESSING?

I THINK THE LEGISLATURE HAS DONE A PRETTY GOOD JOB IN ATTEMPTING TO TACKLE OFF MANY OF THE ISSUES THAT RELATE TO THIS SUBJECT. I DO THINK THERE ARE CERTAIN NUANCES AND ASPECTS OF IT THAT THE COURT WILL BE -- AND ASPECTS OF IT THAT THE COURT WILL BE MORE SENSITIVE TO, THAT THE LEGISLATURE IS NOT.

THE LEGISLATURE HAS CREATED SOME RESTRICTIONS, NOW, BY STATUTE. IS THAT CORRECT? TO ACCESS TO CERTAIN INFORMATION IN COURT RECORDS KEPT BY THE CLERKS. IS THAT CORRECT?

OH, YES, AND THAT IS ONE OF THE REASONS FOR THE UNDERTAKING, IS OVERALL, FLORIDA'S COURT SYSTEM IS IN A RELATIVELY UNIQUE POSITION VIS-A-VIS MOST OF THE OTHER COURT SYSTEMS IN THE COUNTRY. MOST OF THE COURT SYSTEMS IN THE NATION ARE UNDERTAKING TO DOES EXACTLY -- EXCEPTIONALLY -- ESSENTIALLY WHAT WE ARE RECOMMENDING IT TO YOU NOW, WHICH IS FOR A THOROUGH STUDY OF THE SUBJECT, BUT FLORIDA IS IN AN UNIQUE POSITION WITH REGARD TO CONSTITUTIONAL DIMENSION, AND IT IS THE LEGISLATURE THAT HAS THE POWER TO CREATE EXEMPTION TO SAY PUBLIC ACCESS OR TO MAKE SUCH DOCUMENTS CONFIDENTIAL.

GIVEN THAT OUR, WE PLACE A GREAT VALUE, AND AS YOU HAVE INDICATED IT IS CONSTITUTIONALLY CONSTITUTIONALLY-BASED, ON OPEN RECORDS AND OPEN ACCESS, INCLUDING OPEN ACCESS TO JUDICIAL RECORDS, AND GIVEN THAT THE LEGISLATURE, NOW, HAS PICKED OUT VERY SPECIFIC INFORMATION AND RESTRICTED ACCESS TO THAT INFORMATION, ISN'T A MORATORIUM ON ANY INTERNET ACCESS TO COURT RECORDS A RATHER DRASTIC STEP TO TAKE?

I DON'T THINK SO, FOR A COUPLE OF REASONS. FIRST OF ALL, THE MORATORIUM THAT THE LEGISLATURE HAS PUT INTO PLACE IS RELATIVELY NARROW. IT DEALS WITH THREE ISSUES SPECIFICALLY. CASES BROUGHT UNDER THE JUVENILE RULES, UNDER THE PROBATE RULES, AND UNDER THE FAMILY LAW RULES. THIS DOES NOT, IN ANY WAY, ADDRESS THE PROBLEM OF EXEMPT OR CONFIDENTIAL INFORMATION THAT IS CONTAINED IN OTHER TYPES OF COURT RECORDS, AND ONE OF THE THINGS THAT IS VERY IMPORTANT ABOUT THIS WHOLE ISSUE, IS THAT WE HAVE DISCOVERED THAT THERE IS NO MECHANISM IN PLACE, AND I AM NOT SURE THAT,

PRACTICALLY SPEAKING, ONE WILL BE FOUND, WITHOUT SUBSTANTIAL TECHNOLOGICAL ADVANCES TON SMAT,O THAT EVEN THOUGH WE ARE NOT TALKING ABOUT FAMILY LAW OR PROBATE OR JUVENILE CASES AT THE MOMENT, THE OPPORTUNITY FOR EXEMPT OR CONFIDENTIAL INFORMATION TO GO OUT OVER THE INTERNET, IS EXTREMELY HIGH.

BUT AREN'T YOU TALKING ABOUT CONVENIENCE OF ACCESS, AS OPPOSED TO CONFIDENTIALITY -- EXACTLY.

YOU ARE SAYING THAT A PERSON COULD GO TO THE COURTHOUSE AND HAVE PHYSICAL ACCESS TO THESE RECORDS BUT SIMPLY COULDN'T HAVE THE SAME ACCESS ON THE INTERNET, AND THERE IS WHERE THERE IS A DISCONNECT THERE, YOU KNOW, WITH THIS, SO WE ARE NOT TALKING ABOUT CONFIDENTIAL INFORMATION. OBVIOUSLY THERE IS A MECHANISM, IF THERE IS INFORMATION SOUGHT TO BE HELD IN A COURT FILE CONFIDENTIALLY, USING THE SIMPLE EXAMPLE OF JUVENILE RECORDS, FOR INSTANCE, THAT RESTRICTS ACCESS TO THOSE RECORDS, BUT WE ARE JUST TALKING ABOUT THE EASE OF ACCESS TO INFORMATION THAT HAS NOT BEEN DEEMED CONFIDENTIAL, ARE WE NOT?

RIGHT. BUT THE PRACTICAL PROBLEM IS THAT THERE IS NO MECHANISM IN PLACE FOR FULLY SCREENING OUT ALL OF THIS CONFIDENTIAL AND EXEMPT INFORMATION, SO THAT IF I WERE TO GO TO A CIRCUIT COURTHOUSE AND ASK THE CLERK OF THE COURT TO SEE A PARTICULAR FILE, THE FILE WOULD BE TURNED OVER TO ME, WITHOUT ANY EFFORT BEING MADE TO EXCISE ANY OF THIS CONFIDENTIAL OR EXEMPT INFORMATION, IF IT WERE THERE. NOW, THE REASON WHY THAT HAS NOT BEEN A PARTICULAR PROBLEM IN THE PAST, IS BECAUSE THAT PHRASE PRACTICAL OBSCURITY MEANS THAT RELATIVELY LITTLE OF THIS INFORMATION ACTUALLY MAKES ITS WAY OUT ON TO THE STREET, BUT THE PROBLEM IS THE SAME. THE DIFFERENCE IS THAT THE PROBLEM EXPLODES, WHEN YOU CONSIDER THAT THAT SAME FILE, WITH THAT SAME EXEMPT OR CONFIDENTIAL INFORMATION, GOES TSD, AND I AM NOT TALKING ABOUT A JUVENILE CASE, FOR EXAMPLE. I AM TALKING, BECAUSE THE CLERKS TO THEIR CREDIT, IN THE, WHERE THERE ARE BROAD CATEGORIES OF EXEMPTION, DO A PRETTY GOOD JOB IN KEEPING JUVENILE CASES CONFIDENTIAL AND CERTAIN OTHER MATTERS, BUT IN OTHER AREAS, THEY DON'T DO A VERY GOOD JOB, BECAUSE THERE ARE OVER 750 OF THESE STATUTORY EXEMPTIONS IN MAKING CONFIDENTIAL, AND THEY ARE VERY DIFFICULT FOR THE CLERKS TO GET AHOLD OF.

I AM HAVING DIFFICULTY SQUARING MORATORIUM WITH A CONSTITUTIONAL RIGHT OF ACCESS TO THESE RECORDS, AND SO TELL ME HOW THE COMMITTEE HAS ATTEMPTED TO DEAL WITH THAT, IN TERMS OF SQUARING, HAVING A COMPLETE MORATORIUM ON INTERNET ACCESS TO COURT RECORDS, WITH A CONSTITUTIONAL RIGHT OF PUBLIC ACCESS TO THESE RECORDS, WHEN THERE ARE MECHANISMS IN PLACE, IN MANY OF THE CLERK'S OFFICES NOW, THAT PROVIDE THAT EASE OF ACCESS. I AM JUST HAVING DIFFICULTY. WE HAVE GOT A CONSTITUTIONAL RIGHT ON THE ONE HAND, AND NOW YOU ARE TALKING ABOUT PUTTING AN ABSOLUTE BAN ON ACCESS TO THAT INFORMATION ELECTRONICALLY, WHILE WE ARE STUDYING THE ISSUE, AND SO WE ARE IN A SENSE, SUSPENDING OR CERTAINLY VERY MUCH LIMITING THAT CONSTITUTIONAL RIGHT, FORCING THAT PERSON TO GO DOWN TO THE COURTHOUSE, IF HE WANTS TO EXERCISE THAT CONSTITUTIONAL RIGHT. SO HELP ME WITH HOW, DID THE COMMITTEE COME TO GRIPS WITH THAT AND TRY TO SAY, WELL, HERE IS HOW --

YES, YOUR HONOR. WE DID. AND I THINK THE FUNDAMENTAL QUESTION IS WHETHER THERE IS ANY SORT OF DENIAL OF ACCESS, WHEN THERE IS A LIMITATION ON PUBLISH PUBLISHING A DOCUMENT ON THE INTERNET. THERE IS NO SUGGESTION HEEAT ANYTHING THAT IS, THAT IS BEING PROPOSED WILL IN ANY WAY LIMIT ACCESS TO COURT RECORDS, ANY MORE THAN THEY WERE, SAY, TWO WEEKS BEFORE SARASOTA OR MANATEE COUNTY, FOR EXAMPLE, STARTED PUTTING CERTAIN DOCUMENTS ON THE INTERNET.

SO THE PRESS COULD GO TO TAKE THE FILE. TAKE THE FILE OUT. COPY THE INFORMATION DOWN, AND PUT THAT ON THE INTERNET.

RIGHT.

AND THEY COULD HAVE DONE THAT FOR TIME IMMEMORIAL.

EXACTLY. THE UNDERLYING QUESTION IS SIMPLY BECAUSE WE CAN PUT ALL OF THIS STUFF ON THE INTERNET, SHOULD WE PUT IT ON THE INTERNET OR MUST WE PUT IT ON THE INTERNET?

HOW DOES THIS AFFECT THE APPELLATE COURTS PARTICULARLY THIS COURT, IT THAT REGULARLY WE PUT ALL THE BRIEFS AND, ON THE INTERNET? ARE YOU SUGGESTING THE MORATORIUM WOULD BE ACROSS THE BOARD OR JUST FOR THE CIRCUIT COURTS?

YES. IT WOULD RELATE TO CIRCUIT COURT FILINGS.

NOT THE APPELLATE COURT.

PRECISELY.

BUT THE RECORD, NOW, WELL, SO NO APPELLATE COURTS HAVE THE RECORD ON APPEAL FILED ELECTRONICALLY, AT THIS POINT. WE HAVEN'T GOTTEN THERE YET.

NO. NO. AND AS A MATTER OF FACT, EVEN THE MORE BACKWARD COURTS LIKE THE FIFTH DISTRICT, DON'T EVEN HAVE THE BRIEFS ON DISC YET.

I GUESS I UNDERSTOOD THAT ONE OF THE PURPOSES, AT LEAST OF THE MORATORIUM, WOULD BE THAT, IF YOU HAVE TO GO TO THE COURTHOUSE TO ACCESS THE RECORDS, THAT THE CLERKS THERE MIGHT BE MORE LIKELY TO BE ABLE TO REMOVE ANY CONFIDENTIAL INFORMATION OR, AS OPPOSED TO SOMEONE JUST PUTTING EVERYTHING ON THE INTERNET, WITHOUT ANY REAL SEARCHING OF WHAT MAY OR MAY NOT BE CONFIDENTIAL? WOULD THAT BE ONE OF THE REASONS FOR IT?

IT IS ONE OF THE ASPECTS OF IT. FOR EXAMPLE, IF SOMEONE WERE TO SHOW UP AT A COURTHOUSE AND ASK FOR A PARTICULAR FILE, AND CERTAINLY THERE IS, AT THAT MOMENT, THE OPPORTUNITY FOR THE CLERK TO REVIEW IT, TO EXAMINE IT, TO DETERMINE WHETHER THERE IS ANYTHING IN THERE THAT IS EXEMPT OR CONFIDENTIAL.

WHERE DOES THE CLERK GET THE AUTHORITY TO DO THAT?

WELL --

IN OTHER WORDS, ARE WE TALKING ABOUT, NOW, HAVING INDIVIDUAL EMPLOYEES AT THE CLERK'S OFFICE THAT ARE GOING TO BE SENSING WHAT INFORMATION CAN BE RELEASED, AND IF A LAWYER COMES IN AND THE LAWYER WANTS TO LOOK AT THE FILE, THE CLERK SAYS HAVE AT IT. SOMEBODY ELSE COMES IN, THE PRESS, AND THEY GO THROUGH THE SAY, WELL, MAYBE THIS IS QUESTIONABLE. IN OTHER WORDS ARE THERE GUIDELINES IN EFFECT NOW, THAT SAY THAT, AS I INDICATED INITIALLY, THAT WE ARE NOT TALKING ABOUT CONFIDENTIAL INFORMATION. WE ARE TALKING ABOUT INFORMATION THAT HAS TRADITIONALLY BEEN ACCESSIBLE TO ANYBODY COMING TO THE COURTHOUSE AND ASKING TO LOOK AT THAT FILE. ARE WE NOT?

WELL, ACTUALLY WE ARE TALKING ABOUT BOTH.

WELL, I MEAN THERE ARE NO PROBLEM, OBVIOUSLY, WITH, AND WE KEEP USING JUVENILE AS AN

EXAMPLE IN THE SENSE THAT THERE IS A BRIGHT LINE THERE, I ASSUME THAT EVEN OVER THE INTERNET, YOU CAN'T HAVE ACCESS TO A JUVENILE RECORD, THAT THERE IS NO CLERK THAT HAS VIOLATED THE LAW OF CONFIDENTIALITY AND PUT JUVENILE RECORDS. CAN WE ASSUME THAT SAFELY?

WELL, I DON'T KNOW THAT YOU CAN ASSUME -- YOU PROBABLY CAN ASSUME THAT SAFELY, BUT THERE ARE AN AWFUL LOT OF FILES THAT, THERE ARE AN AWFUL LOT OF DOCUMENTS THAT WE FOUND IN THE LIMITED TIME TAKE CERTAIN DOCUMENTS WERE ON THE ENTER -- THAT CERTAIN DOCUMENTS WERE ON THE INTERNET IN CERTAIN CIRCUITS THAT WOULD HAVE NOT BEEN AVAILABLE, UNDER FLORIDA LAW, THAT, FOR WHICH THERE IS A CONFIDENTIALITY REQUIREMENT OR AN EXEMPTION FROM A PUBLIC RECORD. THAT IS A HUGE PROBLEM, IN THAT THERE IS NO WAY OF --

THAT IS A CLERK VIOLATING THE LAW, THEN, IS IT NOT, IF A CLERK IS GIVING PUBLIC ACCESS, WHEN THERE IS A STATUTE THAT MANDATES THAT THOSENGS CONFIDENTIAL. I THOUGHT --

THAT IS COLD COMFORT TO AN INDIVIDUAL WHOSE INFORMATION IS, BY STATUTE, CONFIDENTIAL, THAT THE CLERK SHOULD HAVE FILTERED THAT INFORMATION OUT. THE CLERK'S RESPONSE IS, AS A PRACTICAL MATTER, WE CAN'T DO THAT. THERE ARE OVER 750 EXEMPTIONS AND CONFIDENTIAL ITS UNDER FLORIDA LAW. WE DON'T HAVE THE MANPOWER TO DO THAT. THEREFORE ANOTHER DEVICE HAS TO BE CREATED, AND TO ANSWER YOUR FIRST QUESTION ABOUT POLICIES, THE CLERKS OF THE COURT HAVE, GENERALLY, EVERY CLERK IS DIFFERENT, OF COURSE, BUT GENERALLY, THEY HAVE SAID, IN RESPONSE TO TO OUR INQUIRIES THAT WE ARE WELCOME AND THAT THEY NEED A GENERAL POLICY ON EXACTLY HOW THESE RECORDS ARE TREATED AND HOW THE PROBLEM OF DEALING WITH ALL OF THESE EXEMPTIONS AND CONFIDENTIAL ITS MUST BE DEALT WITH BY ALL OF THE CLERKS OF THE COURT, BECAUSE IT IS THIS INFORMATION --

BUT THE COMMITTEE HAS DETERMINED THAT THE CLERKS HAVE BEEN PUTTING ON THE INTERNET, VOLUMES OF INFORMATION THAT IS CONFIDENTIAL, UNDER SPECIFIC STATUTES.

YERX YOUR HONOR. WE HAVE -- YES, YOUR HONOR. WE HAVE --

THAT THAT IS A WIDESPREAD PROBLEM.

WE DISCOVERED, AS WE WERE SURFING, FOR LACK OF A BETTER TERM, IN VENNTORIES IN PROBATE CASES, EXTREMELY, PSYCHOLOGICAL REPORTS, A NUMBER OF THINGS THAT THE NAMES OF CHILDREN WHO WERE ALLEGED TO HAVE BEEN THE VICTIMS OF SEXUAL ABUSE. ALL OF THE DOMESTIC VIOLENCE INJUNCTION APPLICATIONS WERE ON THE INTERNET. WE PULLED ALL OF THIS STUFF OFF. AND TO THEIR CREDIT, TO THE CLERKS, WHEN THEY, WHEN WE BROUGHT TO THEIR ATTENT S MAN THEN THEY STOPPED PUTTING THOSE ON THERE, BUT WE ARE TALKING ABOUT INCREDIBLE AMOUNTS OF PAPER AND INFORMATION, AND IT IS VERY DIFFICULT FOR THE CLERKS TO BE ABLE TO SCREEN ALL OF THIS STUFF OUT, AND THAT IS THE REAL PRACTICAL PROBLEM. IF WE PUT THIS STUFF ON THE INTERNET, HOW DO WE SCREEN IT OUT? AND IF WE CAN'T SCREEN IT OUT, WHAT KINDS OF POLICIES SHOULD WE PUT INTO PLACE?

CHIEF JUSTICE: CHEE YOU ARE IN YOUR --.

ONE LAST QUESTION BEFORE YOU SIT DOWN, AND THAT IS DID THE COMMITTEE FIND THAT THERE HAD BEEN SUBSTANTIAL PROBLEMS IN OTHER STATES, WITH THE ABUSE OF INFORMATION LIKE THIS, TO USE IN CRIMINAL SCHEMES? THAT IS THAT THERE WAS INFORMATION, FOR INSTANCE, BEING GATHERED FROM COURT FILES, TO USE IN CREDIT CARD FRAUD AND SCHEMES LIKE THAT, OR --

OH, MY GOODNESS Y. IT IS A TERRIBLE PROBLEM. I MEAN, IT IS NOT ONLY A QUESTION OF

PRIVACY AND THE HUGE IMPACT THAT ALLOWING ALL OF THIS STUFF OUT WILL HAVE ON THE JUDICIAL SYSTEM, ITSELF. I THINK IT IS GOING TO AFFECT HOW PEOPLE DECIDE WHETHER TO FILE IN COURT, WHAT INFORMATION WILL GO THERE. I THINK IT IS GOING TO IMPACT HOW JUDGES DO THEIR ORDERS. I AM ALREADY SEEING, FROM JUDGES WHO ARE SENSITIVE TO THIS, THAT THEY WILL DO A VERY, VERY SANITIZED FINAL ORDER AND THEN A MEMORANDUM SEPARATELY THAT, CONTAINS ALL OF THE INFORMATION THAT OTHERWISE WOULD NOT GO OUT, AND THE PROBLEMS OF IDENTITY THEFT ARE HUGE ALL OVER THE COUNTRY, AND THAT IS WHY THIS ISSUE IS BEING STUDIED BY EVERY JURISDICTION.

CHIEF JUSTICE: YOU ARE INTO YOUR REBUTTAL TIME, IF YOU WANT TO SAVE SOME. MR. KANEY.
THANK YOU.

THANK YOU, MR. CHIEF JUSTICE. MAY IT PLEASE THE COURT. I HAVE TWO APOLOGIES TO MAKE. ONE IS THAT THERE ARE NO PAGE NEWSPAPERS ON THE MEMORANDUM THAT I FILED, AND I AM REALLY SORRY ABOUT THAT, BECAUSE WHENEVER I BRING IN INTHEKE TO BRAG ON THAT. THAT IS SHORT FOR ME, AND THE OTHER APOLOGY IS THE CLERK CALLED ME AND ASKED ME, AFTER SHE READ THIS, ONE OF THE DEPUTIES, WHOSE SIDE ARE YOU ON? I CAN'T FIGURE OUT WHICH WAY TO LOG YOU, AND THIS BEING A COURT I HAD TO CHOOSE, SO I CHOSE TO SIT OVER HERE, BUT IN FACT SPEAKING FOR THE FIRST AMENDMENT FOUNDATION, AN ORGANIZATION WHICH I BELIEVE THE COURT IS FAMILIAR WITH, WE ARE NOT ENTIRELY OPPOSED TO WHAT HAS BEEN DONE. WE THINK THAT THE JUDGE GRIFFIN HAS DONE AN EXCELLENT JOB WITH HER REPORT, AND IT IS, INDEED, VERY THOUGHTFUL, AND OUR CONCERN PRIMARILY, IS THE VERY POINT THAT JUDGE GRIFFIN MAKES, THAT WHEN WE GET HERE, WE GET INTO THE CONSTITUTIONAL REALM, AND ONE THING THAT THE FIRST AMENDMENT FOUNDATION ALWAYS WANTS TO BE ABLE TO DO IS TO BRING BAD LEGISLATION OVER TO THIS COURT, WHERE ACCESS IS CONCERNED, AND HAVE THIS COURT BE THE ADJUDICATIVE BODY AND NOT THE LEGISLATIVE BODY.

DO YOU THINK, THEN, WE HAVE A ROLE IN DOING THIS, IN LOOKING AT THIS?

I AGREE. I DEFINITELY AGREE, YOUR HONOR. THERE IS ONE PLACE, AND JUSTICE ANSTEAD HAS TOUCHED ON IT. THERE IS A HIGHLY-LEGISLATIVE POLICY-ORIENTED QUESTION HERE, WHICH IS WHETHER WE WOULD HAVE TWO TIERS OF PUBLIC ACCESS. WOULD WE SAY THAT THERE ARE THINGS THAT ARE NOT SO PRIVATE, SO CONFIDENTIAL, SO HARMFUL IN SOME WAY, THAT THEY NEED NOT BE CONFIDENTIAL. ARE EXEMPT FROM PUBLIC ACCESS. BUT A SECOND TIER WOULD SAY BUT NOT ON THE INTERNET. AND FOR THE VERY REASON JUSTICE PARIENTE SAYS THAT WOULD BE A HOLLOW POLICY, BECAUSE WE ARE SEEING, ALREADY, LEGISLATION I WON'T MENTION THE CASE, BECAUSE IT IS BEFORE JUDGE GRIFFIN, BUT WE ARE SEEING LEGISLATION MOTIVATED TO CREATE A PUBLIC RECORD EXEMPTION, OF CONCERN WITH GETTING IT IN MANUAL FORM AND PUBLISHING IT ON THE INTERNET. SO ONCE WE SAY THAT A RECORD IS NOT FIT FOR A CLERK TO PUBLISH ON THE INTERNET, WE ARE GOING TO BE SAYING THE RECORD OUGHT TO BE EXEMPT SOONER OR LATER.

BUT DO YOU, WHAT IS YOUR POSITION, AS TO WHETHER THIS COURT HAS THE POWER, BY RULE, TO STEP INTO THIS ARENA, AS TO FORGETTING THE QUESTION WHICH YOU ARE REALLY DWELLING ON NOW, AS TO WHETHER THERE IS A CONSTITUTIONAL ISSUE AS TO ACCESS ON THE INTERNET VERSUS JUST PUBLIC RECORDS, PERIOD. BUT THE QUESTION OF WHETHER THIS COURT, BY RULE, CAN DIRECT THE CLERKS AS TO THEIR OPERATION?

I CERTAINLY AGREE THE COURT CAN, YOUR HONOR. I THINK THAT IT IS WITHIN THE INHERENT POWER OF THE COURT, AND UNDER THE HOLDING OF A, WHICH I THINK IS VERY GOOD LAW AND UNOBJECTIONABLE LAW, THERE IS SOME INTERESTING QUESTIONS REGARDING THIS COURT'S SUPERVISORY AUTHORITY. WE CERTAINLY AGREE THE FIRST AMENDMENT FOUNDATION, CERTAINLY AGREES THAT EXEMPT RECORDS ON THE NOT TO BE PUBLISHED ON THE INTERNET.

JUDGE GRIFFIN'S POINT ABOUT THAT WE CERTAINLY AGREE WITH, AND WE THINK THIS IS THE HEAD OF THE BRANCH, AND THE CLERKS, WITH RESPECT TO THE COURTS RECORDS, NEED TO BE GUIDED AND DIRECTED BY THIS COURT, BY RULE OR OTHERWISE, TO ABIDE BY THE EXEMPTIONS IN THEIR PUBLICATION, EITHER ACROSS THE COUNTER OR OUT ONE INTERNET. WE THINK THAT INHERENT POWER, INTERESTINGLY, YOUR HONOR, IS THE PROVISION IN SUBSECTION C OF THE CONSTITUTIONAL CLAUSE, SECTION 24, WHICH GIVES THE LEGISLATURE THE POWER TO ENFORCE THE RIGHT OF ACCESS. AND THAT, UNLIKE THE POWER TO CREATE EXEMPTIONS, DOESN'T SEEM, TO US, TO EXCLUSIVE, SO WE THINK THAT THE COURT'S INHERENT POWER OVER ITS RECORDS WOULD ONLY BE CONSTRAINED BY ONE, AS WE HAVE ARGUED TO THE COURT IN ANOTHER MATTER, WE DON'T BELIEVE THE COURT SHOULD HAVE THE AUTHORITY, BY RULE, TO FETTER OR CONSTRAIN OR RESTRICT THE EXERCISE ABILITY OF THE RIGHT, JUST AS IT DOESN'T HAVE THE AUTHORITY, BY RULE, TO CREATE AN EXEMPTION, BUT THAT IS ENTIRELY DIFFERENT THAN COEXISTING WITH THE LEGISLATURE, IN REGARD TO REGULATING ACCESS TO RECORDS, AND THEN THERE IS THIS QUESTION. DOES THE LEGISLATURE, UNDER AKE, HAVE AUTHORITY TO TELL CLERKS WHAT TO DO WITH COURT RECORDS, IN RESPECT TO THE INTERNET?

WELL, OF COURSE, WE WILL, UNDOUBTEDLY, HAVE AN OPPORTUNITY AT SOME POINT, TO VISIT THAT QUESTION, BUT RIGHT NOW, WE ARE CONCERNED WITH THE POWER THAT THIS COURT HAS IN RULE-MAKING, IN THIS AREA, AND DO YOU KNOW, FROM YOUR STUDY, AS TO WHETHER COURTS IN OTHER JURISDICTIONS HAVE DEALT WITH THE MATTER BY RULE, AS TO THE ACCESS THROUGH INTERNET, TO THE INTERNET, IN LIMITATIONS ON IT?

I DON'T HAVE ANY KNOWLEDGE OF IT, OTHER THAN WHAT I LEARNED FROM READING THE REPORT, BUT THAT IS MY IMPRESSION THAT, COURTS ARE. THE WHOLE PROCESS, IN FACT, THE FEDERAL COURTS ARE NOW DEALING WITH THAT.

EXCUSE ME.

I AM SORRY.

WHAT IS YOUR VIEW OF THE LEGISLATIVE ACTION THAT HAS BEEN TAKEN IN THIS RECORD, SINCE THIS REPORT WAS SUBMITTED, AND WHAT IMPACT ZOO THAT HAVE ON WHAT WE DO -- WHAT IMPACT SHOULDAT HAVE ON WHAT WE DO?

I AM NOT HERE TO SAY THAT THE COURT SHOULD NOT HAVE THE COMMITTEE, AND WE ARE NOT HERE TO SAY THAT WE DON'T THINK THAT THE COURT SHOULD HAVE THE ROLE, BUT WE DO, I AM SOMEHOW REMINDED I DON'T THINK IT IS A GOOD EXAMPLE OF THE EVIDENCE CODE. THERE SEEMS TO BE AN OVERLAP HERE, AND CERTAINLY THERE OUGHT TO BE A COLLABORATION AND A COOPERATION BETWEEN THE LEGISLATIVE EFFORTS AND THE COURTS EFFORTS. FROM OUR PERSPECTIVE, WE WOULD HATE TO BE CAUGHT IN ACROSS FIRE. IT DOESN'T SEEM THAT ON THE TO BE NECESSARY.

WHAT ABOUT THE MORATORIUM QUESTION?

THAT IS TROUBLESOME, YOUR HONOR. THAT IS VERY TROUBLESOME. IN ONE RESPECT, WE DON'T CLAIM A WE DON'T CLAIM THAT THE CONSTITUTION GIVES US A RIGHT TO DEMAND THAT THE CLERK PUBLISH RECORDS ON THE INTERNET. IF WE WERE ADOPTING THAT SECTION TODAY'S, IT MIGHT BE OTHERWISE. BUT IN 1992, WE WEREN'T ACCUSTOMED TO THAT. AT THE SAME TIME, THOUGH, A WEB SITE IS A PUBLISH RECORD. IF THE CLERK MAKES A WEB SITE IN THE COURSE OF PERFORMING HIS OR HER DUTIES, THAT, ITSELF, IS A PUBLIC RECORD, AND DISCRIMINATORY ACCESS TO THAT RECORD, WE THINK, DOES IMPLICATION THE CONSTITUTION --

HOW DO WE SOLVE, THEN, FOR THE INTERIM, SINCE THERE APPEARS TO BE AT LEAST THROUGH THIS REPORT, THE FACT THAT DOCUMENTS THAT SHOULD NEVER HAVE GONE ON THE INTERNET ARE ON THERE, AND WE CAN'T BE MICROMANAGING AND GO TO EACH CLERK'S OFFICE AND TRY

TO FIGURE IT OUT, ISN'T A BETTER POLICY, AT LEAST IN THE SHORT RUN, JUST TO MAKE SURE, YOU KNOW BECAUSE I AM SURPRISED, HEARING THIS, THAT THIS, TODAY, AND IT HAS REINFORCED WHAT I HAVE READ BEFORE, THAT WE HAVE GOT CLERKS THAT ARE GIVING FILES WITH CONFIDENTIAL INFORMATION, EVEN IF IT IS ON THE INTERNET. ISN'T IT A GOOD IDEA, BECAUSE THE POTENTIAL FOR HARMSSOATO I, TO PUT THAT MORATORIUM INTO EFFECT, OR HOW ELSE, WHAT ELSE DO YOU DO IN THE INTERIM, IF YOU DON'T DO THAT?

YOUR HONOR, I THINK THAT THE, THAT THAT IS PROBABLY TRUE. I KNOW THAT, IF YOU WERE TO ISSUE A RULED -- ISSUE A RULE, TELLING THE CLERKS SANITIZE YOUR RECORDS AND MAKE SURE THERE ARE NO RECORDS, AS A CONDITION TO PUTTING THE WEB PAGE UP, THAT WOULD BE --

I WOULD THINK LOOKING BACK, THAT THE CLERKS KNOW THEIR OBLIGATION NOT TO RELEASE STATUTORY-EXEMPT INFORMATION.

THAT IS TRUE, YOUR HONOR, BUT THE PRACTICAL EFFECT OF SAYING THIS TIME WE REALLY MEAN IT, THERE IS A JUDICIAL BRANCH, I MEAN, THE CLERK'S VIOLATION OF THE STATUTE, PRIVACY ACTIONS, WE HAVE GONE THROUGH AN INTERIM UNDER THIS LEGISLATION, MAKING BANK ACCOUNTS AND SOCIAL SECURITY NUMBERS EXEMPT, WHEN CLERKS HAD TO DECIDE WHETHER TO CLOSE DOWN WEB ACCESS OR ATTEMPT TO MANUALLY PICK OUT THE EXEMPT NUMBERS, AND I HAPPENED TO HAVE THE UNIQUE EXPERIENCE OF ADVISING OUR CLERK, MRS. MATUSIC AND I ADVISED HER TO CLOSE OUR WEB SITE, BECAUSE IT WAS PRACTICALLY IMPOSSIBLE FOR HER TO SANITIZE THE WEB SITE AND THEN TO MANUALLY SCRUTINIZE FOR THE EXEMPT NUMBER, ANY RECORD DELIVERED OVER THE COUNTER. SHE AND I NEARLY GOT RUN OUT OF THE COUNTY BY THE TITLE COMPANIES BECAUSE OF THAT.

LET ME ASK, DO YOU KNOW HOW MANY CLERKS, NOW, ARE PUTTING THESE RECORDS ON THE INTERNET, AS I KNOW NOT ALL OF THEM DO. DO YOU KNOW THE NUMBERS?

I DON'T KNOW THE NUMBERS, YOUR HONOR. A BUNCH, I WOULD SAY, ARE DOING IT, ARE PUTTING WEB SITES UP.

YOU, OF COUN YOUR CAPACITY AS A LAWYER, ADVISING THE CLERK IN YOUR PARTICULAR JURISDICTION, ADVISED THATEINTERIM WAS BETTER TO CLOSE THE WEB SITE, THEN, THAT WHAT YOU SAID?

EXACTLY, AND I THINK THAT LEADS TO THE MORATORIUM, ONCE THIS COURT FOCUSES ON THE LEAKAGE OF CONFIDENTIAL INFORMATION INTO THE INTERNET. WHETHER IT NEEDS TO BE A FLAT FLAT-OUT SHUT DOWN OF ALL INTERNET ACCESS, VERSUS A MORE FINELY-TUNED REQUIREMENT, AND WHETHER IT NEEDS TO, PERHAPS, BE COUCHED IN TERMS OF SOME CERTIFICATION BY THE CLERKS THAT THEY HAVE GONE THROUGH AND CLEANSED THEIR RECORDS, AND THAT THEY CAN CERTIFY TO THE COURT THAT THEY HAVE TAKEN THE ADVANCE PRECAUTION TO BE SURE THEY ARE NOT PUBLISHING ANY EXEMPT.

BUT THERE IN BRINGS US BACK TO THE QUESTION THAT I RAISED AT THE OUTSET, AND THAT IS THE COURT'S AUTHORITY TO STEP IN, BY SOME KIND OF ORDER OR RULE, A AND DIRECT THAT THE CLERK, IN EFFECT, SHUT DOWN ITS, THE CLERK'S WEB SITE. WHERE DO WE GET THAT POWER?

I BELIEVE YOU HAVE IT, YOUR HONOR, AND I BELIEVE YOU HAVE IT UNDER THE HOLDING OF AKE, UNDER THE DOCTRINE OF SEPARATION OF POWERS AND THE COURT'S INHERENT POWER TO CONTROL ITS RECORDS. IN AKE, WE SAID THAT THE LEGISLATURE COULD NOT PASS A LAW THAT WOULD REQUIRE A CLERK TO PAY FEES, IF HE WERE THE LOSING PARTY IN AN ACCESS CASE, AND THAT HOLDING, THAT THE COURT'S INHERENT POWER EXTENDS OVER, I AGREE WITH THE COMMITTEE'S STATEMENT ON THAT. I BELIEVE YOU DO HAVE THE POWER, AND I THINK THE ONLY THING WE HAVE TO BE CONCERNED ABOUT IS THE, IS NOT YOUR INHERENT POWER BUT THE EXTENT TO WHICH IT COLE IDES WITH THE -- IT COLLIDES WITH THE PUBLIC'S RIGHT OF ACCESS,

WHICH I DON'T ARGUE THAT AN INTERNET MORATORIUM WOULD, IN FACT, DO.

IN THE SAME VAIN, DO YOU SEE THAT -- IN THE SAME VEIN, DO YOU THATLD EVENTUALLY COMPLY WITH THE TWO TIERS OF PUBLIC ACCESS, WHERE IN A DECADE WE HAVE GOT TERRIBLE PHOTOGRAPHS OF -- WHERE WE HAVE THE TERRIBLE PHOTOGRAPHS OF A VICTIM OF A CRIME, IT IS OBVIOUSLY PART OF THE RECORD THAT COMES UP THERE, BUT PUBLISHING IT ON THE INTERNET, AGAIN, IS A DIFFERENT LEVEL OF WHAT YOU ARE SAYING ABOUT THAT.

WHAT I WANT TO SAY ABOUT THAT YOUR HONOR, AND I HAVE BEEN, I HAVE BEEN, YOU CHASTISED ME ONCE FOR NOT SAYING WHAT I REALLY WANTED TO SAY, WHEN I TALKED ABOUT THE ELEPHANT AND THE BLIND MAN, BUT THE WORD IS GUTTENBERG. WHAT I SEE AS THE OVER AVERAGING POLICY QUESTION IS -- THE OVER ARCHING POLICY QUESTION IS SHOULD THERE BE TWO TIERS? SHOULD WE FORCE THE EVIL OF THE COMMUNICATIONS REVOLUTION THAT THE CROWN REGARDED THE PRINTING PRESS AS, WHEN THEY BEGAN LICENSING PRINTERS IN ENGLAND. WE ARE GOING THROUGH ANOTHER WAVE. THE IDEA THAT ANY FOOL CAN WRITE ON ANY PIECE OF PAPER AND STICK IT ON A TREE IN ANY TOWN AND CRITICIZE THE KIJ OR THE QUEEN WAS -- THE KING OR THE QUEEN WAS SHOCKING. GUTTENBERG GAVE US THE INFORMATION, THE RENAISSANCE, MODERN WESTERN CULTURE, THAT THERE IS NO DOUBT THAT THE INTERNET HAS SOME SIMILAR PORTENDS FOR REVOLUTION, BUT THE EASY ANSWER TO THAT, THERE WAS A LIMIT ON THE ATTENDANCE AT THE SCOPES TRIAL. THAT LIMIT WAS THE NUMBER OF CHAIRS IN THE COURTROOM. TODAY WE DON'T HAVE THAT LIMIT, SO WAS THAT TRIAL, WOULD THE TRIAL BE DIFFERENT IN QUALITY, IF WE COULD HAVE ALL WATCHED IT?

YOU ARE, NOW, ARGUING WHETHER IT IS GOOD POLICY OR NOT. FOLLOWING UP ON WHAT JUSTICE WELLS ASKED, IS THAT FOR THE SAME REASON THAT YOU SAY THAT WE HAD THE AUTHORITY TO PUT A MORATORIUM ON IT, DOES THE COURT HAVE THE AUTHORITY TOT WHAT CAN AND CANNOT BE ON THE INTERNET?

YES. YES. MY ARGUMENT THERE IS A PRUDENTIAL ARGUMENT TO THE COURT E WE T DEEPLY INVOLVED IN EDITING THE INTERNET WE STEP BACK AND HAVE A MULTI-BRANCH LOOK AT THE POLICY. YES.

WE ARE NOT HERE, AND THE COMMITTEE HAS SAID THEY WANT --

THAT IS WHY I AM, FIND MYSELF IN FAVOR OF THE COMMITTEE, AND IF THERE HAD BEEN A YELLOW LIGHT CHOICE I COULD HAVE TAKEN, INSTEAD OF A RED OR A GREEN, I WOULD HAVE CHOSEN YELLOW, BECAUSE PRIMARILY I WANT TO BRING TO THE COURT'S ATTENTION THE WAY THE CONSTITUTION WORKS IN HERE, WE ARE STILL SUFFERING THE BANKS OF GUILT AT OUR -- THE PANGS OF GUILT AT OUR FOUNDATION THAT WE WERE NOT HERE WHEN THE WORK GROUP CAME UP HERE A FEW MONTHS AGO, AND WE DON'T WANT TO MAKE THE MISTAKE OF NOT BEING HEARD AT THE BEGINNING, AS OPPOSED TO THE END OF THIS PROCESS, BUT WE ARE COMFORTABLE WITH YOUR POWER TO ACT IN THIS ARENA, AND WITH THE, THE FIRST AMENDMENT FOUNDATION WOULD ALWAYS RATHER HAVE THIS COURT IN CHARGE OF ITS PRECIOUS RIGHTS OF ACCESS THAN ANY OTHER BRANCH OR LEVEL OF GOVERNMENT THAT WE COULD IMAGINE, AND WE DON'T MEAN TO BE UNDERSTOOD DIFFERENTLY WHEN WE SPEAK OF JUDICIAL PRUDENCE AND RESTRAINT, IN TERMS OF POLICY-MAKING.

CHIEF JUSTICE: THANK YOU, MR. KANEY.

THANK YOU ALL.

CHIEF JUSTICE: ANYTHING FURTHER?

NO, YOUR HONOR.

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THE CASE. WE WILL NOW PROCEED TO TAKE OUR MORNING RECESS. FOR PURPOSES OF PLANNING FOR THE OTHER CASES, WE WILL TAKE, RIGHT NOW, A TEN-MINUTE RECESS. WE WILL COME BACK BACK AND HEAR THE NEXT TWO CASES AND TAKE OUR NEXT TWO CASES, AND FOLLOW THAT, WE WILL HEAR THE LAST CASE FOR THE MORNING. SO THE COURT WILL BE IN RECESS FOR TEN MINUTES.