South Carolina Law Review

Volume 55
Issue 4 *SYMPOSIUM: COURT-ENFORCED SECRECY*

Article 5

Summer 2004

Role of Judges in Secret Judgments

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THE ROLE OF JUDGES IN SECRET JUDGMENTS

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Almost a century ago, Congress established the procedure by which changes in the Federal Rules of Civil Procedure could be effected. Recognizing that Congress frequently had too much on its agenda and that "procedural rules" would not command a high priority, Congress directed that the federal judiciary have a concomitant role in making such changes. The system has worked reasonably well, but neither the Congress nor the courts are known for speedy actions. And so it should not surprise us that the issue of secrecy in court proceedings and judgments has languished somewhat.

Congress focused some attention on the subject in the 1980s. I testified before a Senate committee in 1994, while I was still Chief Judge of the Court of Appeals for the D.C. Circuit, and therefore, a member of the U.S. Judicial Conference. My testimony supported a bill sponsored by Senator Herbert Kohl of Wisconsin. The bill has been reintroduced each session of Congress since then, but has not yet passed. Witnesses testified on behalf of the Rules Committee of the U.S. Judicial Conference at those 1994 hearings, assuring Congress that the conference was working on the problem. That work is apparently still continuing. For that reason it is so refreshing that Chief Judge Joseph F. Anderson Jr. of the U.S. District Court for the District of South Carolina and Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina have taken the initiative and changed the landscape of secrecy in court proceedings and judgments.

Let me start out by saying that I believe in and respect the right to privacy. It underlies many of the other freedoms we have in this country, and I think that private people are entitled to enjoy that right to the fullest extent compatible with other people's rights. If you choose, as I did for many years, to live as a public person, you may give up many, but not all, of those privacy rights. But no one is forced to run for Congress or become a judge, and that decision is a choice that people make. As long as I remain in the private sector, I do not have to tell you anything, and you may find out when I am finished that I indeed have not told you anything.

So, if you want to make a secret—but legal—agreement with your neighbor not to fight any more, that is fine. However, it is when you ask to have a judge put his imprimatur on that agreement that it enters the public domain.

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Our court systems are very much a part of the public domain. The judiciary is a separate and equal branch of government, almost completely supported by the public purse. Its powers are enormous and can be applied to all within the jurisdiction.

Therefore, when a litigant takes a lawyer in hand and files a pleading in a courtroom, any courtroom, the presumption of privacy evaporates. Indeed, any presumptions must always be in the other direction. There may be reasons why the information contained in court generated documents should remain confidential. Let the secrecy-seeker bear the burden to show the significant and important reasons to rebut the presumption of public access to all of the proceedings of that public institution.

Are there some kinds of matters in which secrecy should prevail? Of course. Trade secrets are one obvious category. Some types of family disputes clearly deserve protection, but mere embarrassment for some of the litigants may not be sufficient to overcome the heavy presumption for openness that I would like to see imposed. Matters of security, both personal and national, are other obvious categories. While I hate to impose new and heavy burdens on the already hard-working trial bench, a clear policy against secrecy in the justice system ought to make that burden tolerable.

I recall a case from my days on the bench where the public nature of judicial institutions came up in some unusual twists. The plaintiff was suing the United States government for spreading disinformation about him that cost him his job in the American Communist Party during the 1950s. As part of his suit, he sought information about a mole that the FBI had put in the party back at the time who apparently spread some of this allegedly tortious disinformation. The government resisted the discovery request, citing its concern that the mole's effectiveness would be compromised if his identity was disclosed to the plaintiff. We contemplated that the mole probably would be well into his eighties by the time of the lawsuit and seriously doubted his continuing effectiveness as a mole. Therefore, a majority of the court ordered the government to comply with the discovery order of the lower court. One of my colleagues dissented from this decision and used some of the classified material in the sealed record to substantiate his dissent. Those portions of the opinion appeared as blank pages in West Second, but we recognized that the use of classified material required such a bizarre opinion.

At that point, the government decided that rather than appeal further, it would settle with the plaintiff for a substantial sum of money. Then followed the most bizarre part of this most bizarre case. The government moved to vacate our earlier opinion, so that it could not be used as precedent for future cases. At that point, our panel found unanimity again, and the dissenting judge on the merits wrote the opinion refusing the government's motion to vacate our opinion. In doing so, he quoted from a Seventh Circuit case which aptly described the public nature of judicial proceedings. He quoted:

> When a clash between genuine adversaries produces a precedent . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.[1]

What was said about the losing party's efforts to vacate an opinion apply equally to the losing party's efforts to keep secret the terms of the settlement or any other part of the proceedings. The public interest must always be perceived as the most important interest to weigh in any consideration of a request to turn a public proceeding private. We ought to view with a heavy jaundice any efforts to let secrecy prevail.

1. *In re* Mem'l Hosp. of Iowa County, Inc. v. United States Dep't of Health and Human Servs., 862 F.2d 1299, 1302 (7th Cir. 1988).