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M E M O R A N D U M

To: The Hon. Thad Balkman
District Judge
State of Oklahoma

Re: Will the draft uniform act -- The Redaction of Judges' Personal Information from Public Records Act -- as written, withstand a First Amendment challenge based on an denial right of access to government information?

In my judgement, the draft uniform act should withstand a First Amendment challenge. The primary reason for this conclusion is that redaction of judges' personal information from "public records" should not provoke close judicial scrutiny by federal courts*

As currently drafted, the uniform act is a privacy program designed to keep personal information (as defined by the draft uniform law) from "public records." The draft seems clear enough about what is "personal information." Redaction is essentially passive: it is a policy to not publish, not disclose, not publicize. The definitions of "public records" ought to be carefully delineated to focus on government-created, government-maintained files – including online displays of data.

Current patterns of federal judicial analysis seem to reflect three streams of thought:

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* By close scrutiny, I mean "strict scrutiny," or "exacting scrutiny" or any other standard, by whatever name, which imposes on government a duty to justify a policy with proof that "means" are effective in achieving substantial, important or compelling objectives. Such standards differ from more deferential standards applicable to government regulation of the time, place and manner of expression or laws designed to achieve objectives unrelated to the suppression of expression.

> The conclusion that the public has a First Amendment right to access the courts, however, is controversial. Although commentators often assume that such a right exists, judges and scholars continue to debate whether the Constitution requires that the courts be open to the public. The disagreement over a First Amendment right of access to the courts can be traced to three divergent lines of Supreme Court cases addressing a constitutional right of access to government information. The first is a series of cases from the 1970s in which the Court held that the First Amendment does not prevent the government from restricting press access to prisoners and prisons. In the second line of cases, the Court expanded on its decisions in the prison access cases, holding that *there is no constitutional right to obtain information from the government generally.* In a third series of cases in the 1980s, however, the Court took a decidedly different tack when confronted with the question of public access to criminal trials and pre-trial proceedings. [Footnotes omitted; emphasis added]

DAVID S. ARDIA, COURT TRANSPARENCY AND THE FIRST AMENDMENT, 38 CARDOZO L. REV. 835, 844 (2017). See also: ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1295-96 (7TH ED. 2023).

Though scholarly commentary often shows enthusiasm for more access to proceedings and information (e.g., evidence, testimony), there seems to be no precedent for a general public right of access extending to addresses, family identification, and the like. GRAYSON CLARY, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, "However well-intentioned, legislation to prevent the disclosure of federal judges' personal information could also impede accountability reporting,"(October 20, 2022) [https://www.rcfp.org/judicial-security-first-amendment/]; JARED LENOW, FIRST AMENDMENT PROTECTION FOR THE PUBLICATION OF PRIVATE INFORMATION, 60 VANDERBILT L. REV. 235 (2007).

Usually, it seems, an argument for a public right of access is given a narrow focus and application. Professor Ardia's argument is an example:

> Although the conclusion that the First Amendment embodies an affirmative right of access to the courts marks a significant expansion in our current understanding of the First Amendment's scope, the implementation of such a right can proceed largely through the application of established First Amendment doctrines. As with other First Amendment rights, the right of public access would not be absolute. *In evaluating public access claims, a court should start with a presumption that the public has a First Amendment right of access to all court proceedings and filed records that are material to a court's exercise of its adjudicatory power.* This presumption can, in appropriate circumstances, be overcome when the countervailing interests supporting secrecy are compelling. Before closure can be ordered, however, courts must conclude that the proposed restrictions are narrowly tailored and that there are no other alternatives to closure. [Emphasis added]

The language of close scrutiny is here, but only for "proceedings and … records … material to a court's exercise of adjudicatory power." The uniform law should reflect – and does reflect - findings that almost all personal information is not covered by this principle. It reflects the sense of competing interests, but also the reality that, for the most part, redaction is not censorship. It is not punishment of legitimate reporting. It is not a sanction against expressive liberty. The conclusion is supported not only by the importance of security concerns, but also by the flimsiness of claims that access to this type of data is material to public participation in public affairs and republican government.

There is a danger if the program is extended beyond a passive redaction policy to a program to restrict the public, including the press or "data brokers," from gathering information and circulating information that has been redacted. In other words, a more demanding scrutiny might apply if there is a statutory authority for penalizing circulation of private data. *See, e.g., Brayshaw v. City of Tallahassee*, 709 F. Supp. 2d 1244 (N.D. Fla. 2010) (prosecuting an individual for publishing specified private information violates the First Amendment). Even in cases involving government beyond redaction, a careful balancing of interests is appropriate. A particularized balancing might be more useful, but better achieved through freedom of information regulations and statutes, not the blunt tools of more general principles of federal constitutional law.

See also:

Brad Kutner, "Federal Judges Got the Power to Remove Their Private Info From the Internet—And They're Using It," National Law Journal (March 16, 2023) (discussing federal Daniel Anderl Judicial Security and Privacy Act, enacted after the son of a federal judge in New Jersey was murdered at the hands of a former litigant who used publicly available information to track down the jurist's home address).