

**AT LAW**

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## Privacy on Trial

Big Brother is watching you, your honor.

**BY ALEX KOZINSKI\***

**A**n open letter to federal judges:

The U.S. Bureau of Prisons maintains the following sign next to all telephones used by inmates:

“The Bureau of Prisons reserves the authority to monitor conversations on the telephone. Your use of institutional telephones constitutes consent to this monitoring. . . .”

I’m planning to put signs like these next to the telephones, computers, fax machines and other equipment used in my chambers because, according to a policy that is up for a vote by the U.S. Judicial Conference, we may soon start treating the 30,000 employees of the judiciary pretty much the way we treat prison inmates.

### **Public Furor**

Exaggeration? Not in the least. According to the proposed policy, all judiciary employees—including judges and their personal staff—must waive all privacy

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in communications made using “office equipment,” broadly defined to include “personal computers . . . library resources, telephones, facsimile machines, photocopiers, office supplies.” There is a vague promise that the policy may be narrowed in the future, but it is the quoted language the Judicial Conference is being asked to approve on Sept. 11.

Not surprisingly, the proposed policy has raised a public furor. This has so worried the policy’s proponents that Judge Edwin Nelson, chairman of the Judicial Conference’s Automation and Technology Committee, took the unprecedented step of writing to all federal judges to reassure them that the proposed policy is no big deal. I asked that my response to Judge Nelson be distributed to federal judges on the same basis as his memo, but my request was rejected. I must therefore take this avenue for addressing my judicial colleagues on a matter of vital importance to the judiciary and the public at large.

The policy Judge Nelson seeks to defend as benign and innocuous would radically transform how the federal courts operate. At the heart of the policy is a warning—very much like that given to federal prisoners—that every employee must surrender privacy as a condition of using common office equipment. Like prisoners, judicial employees must acknowledge that, by using this equipment, their “consent to monitoring and recording is implied with or without cause.” Judicial opinions, memoranda to colleagues, phone calls to your proctologist, faxes to your bank, e-mails to your law clerks, prescriptions you fill online—you must agree that bureaucrats are entitled to monitor and record them all.

This is not how the federal judiciary conducts its business. For us, confidentiality is inviolable. No one else—not even a higher court—has access to internal case communications, drafts or votes. Like most judges, I had assumed that keeping case deliberations confidential was a bedrock principle of our judicial system. But under the proposed policy, every federal judge will have to agree that court communications can be monitored and recorded, if some court

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administrator thinks he has a good enough reason for doing so.

Another one of our bedrock principles has been trust in our employees. I take pride in saying that we have the finest work force of any organization in the country; our employees show loyalty and dedication seldom seen in private enterprise, much less in a government agency. It is with their help—and only because of their help—that we are able to keep abreast of crushing caseloads that at times threaten to overwhelm us. But loyalty and dedication wilt in the face of mistrust. The proposed policy tells our 30,000 dedicated employees that we trust them so little that we must monitor all their communications just to make sure they are not wasting their work day cruising the Internet.

How did we get to the point of even considering such a draconian policy? Is there evidence that judicial employees massively abuse Internet access? Judge Nelson's memo suggests there is, but if you read the fine print you will see that this is not the case.

Even accepting the dubious worst-case statistics, only about 3% to 7% of Internet traffic is non-work related. However, the proposed policy acknowledges that employees are entitled to use their telephone and computer for personal errands during lunchtime and on breaks. Because lunches and breaks take up considerably more than 3% to 7% of the workday, we're already coming out ahead. Moreover, after employees were alerted last March that downloading of certain files put too much strain on the system, bandwidth use dropped dramatically. Our employees have shown they can be trusted to follow directions.

What, then, prompted this bizarre proposal? The answer has nothing to do with bandwidth or any of the other technical reasons articulated by Judge Nelson. Rather, the policy became necessary because Leonidas Ralph Mecham, director of the Administrative Office of the U.S. Courts, was caught monitoring employee communications, even though the Judicial Conference had never authorized him to do so. Unbeknownst to the vast majority of judges and judicial employees, Mr.

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Mecham secretly started gathering data on employee Internet use. When the Web sites accessed from a particular computer affronted his sensibilities, Mr. Mecham had his deputy send a letter suggesting that the employee using that computer be sanctioned, and offering help in accomplishing this. Dozens of such letters went out, and one can only guess how many judicial employees lost their jobs or were otherwise sanctioned or humiliated as a consequence.

When judges of our circuit discovered this surreptitious monitoring, we were shocked and dismayed. We were worried that the practice was of dubious morality and probably illegal. We asked Mr. Mecham to discontinue the monitoring. Rather than admitting fault and apologizing, Mr. Mecham dug in his heels. The monitoring continued for most of the country until Mr. Mecham was ordered to stop by the Judicial Conference Executive Committee.

Hell hath no fury like a bureaucrat unturfed. In a fit of magisterial petulance, Mr. Mecham demanded that his authority to monitor employee communications be reinstated without delay. A compliant Automation Committee hastily met in secret session to draft the proposed policy, pointedly rejecting all input from those who might oppose it. In their hurry to vindicate Mr. Mecham's unauthorized snooping, the committee short-circuited the normal collegial process of deliberation and consultation.

Salving Mr. Mecham's bureaucratic ego, and protecting him from the consequences of his misconduct, is hardly a basis for adopting a policy that treats our employees as if they live in a gulag. Important principles are at stake here, principles that deserve discussion, deliberation and informed debate. As Chief Judge James Rosenbaum of Minnesota has stated, "giving employers a near-Orwellian power to spy and snoop into the lives of their employees, is not tenable." If we succumb to bureaucratic pressure and adopt the proposed policy, we will betray ourselves, our employees and all those who look to the federal courts for guidance in adopting policies that are both lawful and enlightened.

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## **Moral Authority**

I therefore suggest that all federal judges reading these words—indeed all concerned citizens—write or call their Judicial Conference representatives and urge them to vote against the proposed policy. In addition, we must undo the harm we have done to judicial employees who were victims of Mr. Mecham’s secret, and probably illegal, snooping. The Judicial Conference must pass a resolution that offers these employees an apology and expungement of their records.

Moreover, we should appoint an independent investigator to determine whether any civil or criminal violations of the Electronic Communications Privacy Act were committed during the months when 30,000 judicial employees were subjected to surreptitious monitoring. If we in the judiciary are not vigilant in acknowledging and correcting mistakes made by those acting on our behalf, we will surely lose the moral authority to pass judgment on the misconduct of others.