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Lawyers in the Best Sense

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FEBRUARY 20, 2017

The Honorable Darrell Issa, Chairman
The Honorable Jerry Nadler, Ranking Member
Subcommittee on Courts, Intellectual Property and the Internet
Judiciary Committee
2138 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Issa, Ranking Member Nadler, and members of the Subcommittee on Courts, Intellectual Property, and the Internet:

Thank you for the opportunity to testify before the Subcommittee at its hearing on Judicial Transparency and Ethics regarding public access to the federal court's online case and docket information system, PACER. I wish to supplement my testimony with some recommendations, which I would like to make part of the permanent record.

The three recommendations share the common purpose of better informing future discussions surrounding PACER. Each addresses a different problem raised in my testimony: the transparency of PACER's fee structure, whether or not PACER's current model is consistent with the intent of the Congress, and whether there has been adequate outside input into PACER's design and operation.

1. Government Accountability Office Audit of PACER

Publicly available information on PACER's operation and finances is scattered and confusing. For all practical purposes PACER's operations are opaque. There is inadequate public reporting—and likely inadequate reporting to Congress—concerning the sources of fees, the costs of operation, how PACER funds are allocated, the likely cost of improvements that should be made to its technical infrastructure, ways to reduce the costs of administering PACER, security vulnerabilities, the frequency of and potential responses to address inappropriate disclosure of personal information, and, of particular relevance to the recent hearing: mechanisms to improve public access including bulk dissemination of data.

The Government Accountability Office is well equipped to audit PACER concerning the issues outlined above, and I urge that they be requested to do so.

2. Congressional Research Service Report Assessing the PACER Fee Structure

It seems obvious to an outside observer that fees from PACER users are accumulated and spent in ways inconsistent with the provisions of the E-Government Act of 2002.

I recommend that you request the Congressional Research Service to prepare a report on this point. Clear explanation of what the law permits concerning what PACER is allowed to charge for, whether or not it is permissible for PACER to run a surplus, and how those revenues may or may not be spent would bring welcome clarity to the discussion. Additionally, the report can examine the legislative authority for alternative funding mechanisms, such as removing dissemination fees and increasing filing fees.

3. Open PACER to public comment and expert advice

The Administrative Office of the U.S. Courts (AO) has not held a public comment period on PACER for more than a decade. As suggested by Congressman Chaffetz, Congresswoman Lofgren, and others, public engagement can help determine whether PACER is meeting public needs, and whether it might benefit from alternative technical and administrative approaches. The AO should hold a public comment period now and continue to do so on regular basis. One additional purpose of such a comment period might be the identification of experts and stakeholders who could potentially make meaningful contributions via an advisory-board mechanism.

Thank you again for this opportunity. The committee's ongoing attention to this matter is welcome and very much appreciated. I would be happy to furnish additional information or to answer any further questions.

Sincerely yours,

Thomas R. Bruce
Director, Legal Information Institute
Cornell Law School

enc: Letter from Congresswoman Zoe Lofgren
Letter from Senator John Cornyn

cc: Brewster Kahle, Librarian, The Internet Archive
Michael Lissner, Free Law Project
Carl Malamud, President, Public.Resource.Org
Peter W. Martin, Dean Emeritus, Cornell Law School
Daniel Schuman, Policy Director, Demand Progress
Ronald E. Wheeler Jr., President, American Association of Law Libraries

United States Senate

WASHINGTON, DC 20510

September 18, 2014

The Honorable John D. Bates
Director
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Judge Bates:

We are writing today to express concern about the removal of the records of four U.S. Courts of Appeals and one U.S. Bankruptcy Court from the Public Access to Court Electronic Records (PACER) system. The abrupt decision to remove these critical records from public view has concerned lawyers, librarians, and archivists and perplexed technical experts. Our understanding is that many of these missing cases—some filed as recently as March 2012—are now only available by calling or writing to a court clerk to have a hard copy mailed for a fee of up to \$63. In an era of ubiquitous technology, it is difficult to imagine any reason for such a procedure.

Public announcements from your office indicate that the deleted data is somehow incompatible with your recent NextGen system upgrade. Upgrading the PACER system is a commendable goal and we congratulate you for the hard work that has evidently gone into the NextGen system. However, public access to our courts is a foundation of our democracy, and nowhere is that transparency more important than in our federal judiciary. A functional upgrade should never come at the cost of public access to public documents.

We understand that the Administrative Office is working to rectify this problem, and as you do so, we strongly encourage you to ensure that the solution includes restoration of access to the deleted records on the PACER system. If reincorporation into PACER is infeasible, we strongly encourage the courts to facilitate free public access to these documents through other means. We are aware that all five courts whose records have been removed have received an offer from the nonprofit Internet Archive to host the missing information at no cost to the courts or users. These or similar offers should be pursued where necessary.

Additionally, it is clear that the public was not made aware of the impending loss of these public documents before their removal. We view this as a symptom of the Administrative Office's larger failure to adequately engage the public on the important issue of how they access the public records of our federal courts. Rule 83(a) of the Federal Rules of Civil Procedure and 28 U.S.C. §2071(b) permit courts to institute local rules, but "only after giving appropriate public notice and an opportunity for comment." It is our understanding that input on the recent upgrade to NextGen was limited to organizations and individuals selected by the Administrative Office. The last substantive public comment period on PACER was the Fall 2007 "Request for Comment on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents."

Although Congress has always given great deference to the independence of the federal judiciary when it comes to the mechanics of the operations of our courts, we respectfully recommend that the Administrative Office issue a new request for public comment on the PACER system as a whole. This would offer all members of the public an opportunity to express their views on PACER, the recent NextGen upgrades and, more importantly, what they would like to see from PACER as the system continues to evolve.

Both Congress and the courts work for the American people, and our responsibility is to the American people. Imposing unreasonable barriers to public access is a violation of this responsibility. Therefore we encourage you to restore online access to the court documents recently removed from PACER and seek full comment from the public on how PACER might best serve the public going forward.

Sincerely,



JOHN CORNYN
United States Senator



CHUCK GRASSLEY
United States Senator



TED CRUZ
United States Senator



MIKE LEE
United States Senator

Congress of the United States
Washington, DC 20515

September 17, 2014

The Honorable John D. Bates
Director
Administrative Office of the Courts
One Columbus Circle, NW
Washington, D.C. 20544

Dear Judge Bates:

We are writing to express our concern with the Administrative Office of the Courts' (AO) recent announcement that several decades of case files have been removed from the Public Access to Court Electronic Records (PACER) system of four U.S. Appellate courts and a U.S. Bankruptcy court.

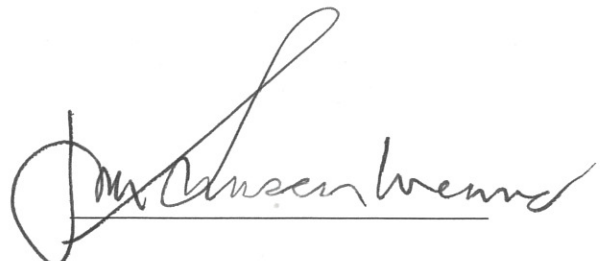
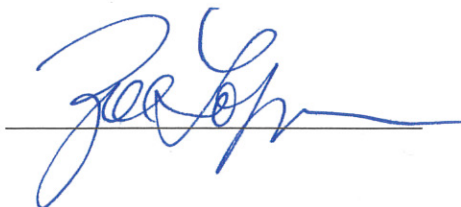
While the AO has stated that this is due to compatibility issues between the old case file format and the NextGen PACER system coming online, we urge the AO to ensure that this information is hosted on the new system, or in the alternative, made available electronically to the public by other means.

Low-cost, online, public access to important briefs, court orders, and written opinions is not only necessary for legal practitioners, but also provides immense public benefit by giving access to historians, academics, journalists, and pro se litigants. In a democracy, the integrity of our laws, and the court's adjudication of them, can only be upheld when a court's decisions and reasoning are made available for public comment and critique.

We understand that the nonprofit Internet Archive has offered to host the removed case files, and provide public access to them for free. We ask that you keep us informed of the AO's progress as this offer is evaluated.

Finally, it is our understanding that both the removal of these old case files and the upgrade of the PACER system were undertaken without comment from the public. Request for Comments (RFCs) are an invaluable tool in evaluating the effectiveness of a program and developing innovative improvements. We urge the AO to take advantage of the benefits of RFCs by requesting public comment on the current upgrade to NextGen system, as well as, commit to issuing RFCs in the future when changes to this important system are being considered.

Sincerely,



Ed Vattetz UT-3

Lynda Bue

Maureen Eshoo
Thomas Massie