April 3, 2017

Hon. Bob Goodlatte, Chairman
Hon. John Conyers, Ranking Member
Judiciary Committee
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Hon. Chuck Grassley, Chairman
Hon. Dianne Feinstein, Ranking Member
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Goodlatte, Ranking Member Conyers, Chairman Grassley, and Ranking Member Feinstein:

We are writing to you as former senior government officials who were responsible for various aspects of the regulatory process that lead to the enactment, promulgation, and enforcement of provisions of the Code of Federal Regulations (CFR). Many of the regulatory provisions in the CFR are public safety regulations which govern important aspects of our modern technical society, such as the safety of infant products and toys, transportation of hazardous materials, the safety of natural gas pipelines, and testing for lead in water.

Many of these public safety regulations are adopted through the process of Incorporation by Reference, a deliberate and careful procedure which uses voluntary consensus standards—many of which are developed for the sole purpose of being enacted into law—and makes those codes part and parcel of the text of the CFR. Many states and local governments use a similar process of incorporation to promulgate building, electrical, plumbing, fire, and other public safety laws and regulations.

Our reason for writing is a recent U.S. District Court decision which prohibits a nonprofit organization called Public.Resource.Org ("Public Resource") from making legally binding portions of the CFR and state law available. The court issued an injunction against Public Resource prohibiting distribution of regulations such as the National Electrical Code, which is binding law in all 50 states and in the CFR.

The Court ruled that despite the fact that these public safety regulations had been enacted into law, they maintained their copyright and any parties wishing to read or copy the public safety codes—including government officials charged with enforcing the laws—must first obtain permission from a private party. Public Resource had not obtained such permission, and was thus guilty of copyright and trademark infringement according to the Court's ruling. An underpinning of the Court's decision was a determination that if Congress had wished for the law not to have copyright by private parties, it would have acted.

It is the long-standing public policy of the United States that edicts of government—the rules and regulations by which we as a democratic people choose to govern ourselves—have no copyright. Nobody needs a license in the United States to read or speak the law. This policy is clearly stated by the U.S. Copyright Office:

> **316.6(C)(1). Edicts of Government.** As a matter of longstanding public policy, the U.S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials. See Banks v. Manchester, 128 U.S. 244, 253 (1888) ('there has always been a judicial consensus, from the time of the decision in the case of Wheaton v. Peters, 8 Pet. 591, that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties'); Howell v. Miller, 91 F. 129, 137 (6th Cir. 1898) (Harlan, J.) ('no one can obtain the exclusive right to publish the laws of a state in a book prepared by him'). *U.S. Copyright Office, Compendium of U.S. Copyright Office Practices, Third Edition, 22 December 2014, § 316.6(C)(1), p. 37.*

Enjoining a private organization from making the law available to inform citizens runs contrary to the very purpose of federal rulemaking. Public Resource not only made over 1,000 public safety regulations in the CFR available to the public, it transformed many of those standards to make them far more accessible and useful, recoding the text and graphics into modern web formats, adding accessibility features for people with visible impairments, and making the codes work on smartphones, ebooks, tablets, and other modern devices. Public Resource did so on a noncommercial basis, never charging for access or restricting use.

The Court's ruling will have profound ramifications for our legal system. If the decision holds, a license will be needed to read the law and this decision will apply not just to the CFR but to all state and local public safety regulations. Despite the Court's ruling, we do not believe it was the intent of Congress to make the law private property. Indeed, the genesis of our Official Journals of Government was precisely the opposite: an attempt to make sure that all citizens knew what federal regulations are in effect so that ignorance of the law is no excuse and so the citizenry can take an active part in our democratic dialogue of deciding what regulations should be put into force as binding law.

There are fundamental constitutional issues at stake here. Under the Court's injunction, Public Resource has been prohibited from speaking the law, a very troubling proposition under the First Amendment. This decision also raises many troubling due process and equal protection concerns. Promulgation is a fundamental requirement of the rule of law, for we cannot be an empire of laws and not a nation of men and women if we do not allow citizens to freely discuss our rules and regulations.

Public Resource is appealing the Court's decision, but that process will take time and will apply only to the questions specifically put before the court. If the Court's decision holds, there will be a long and slippery slope. If a building code can be assigned to a

single private party to distribute in any format it sees fit, could a state government copyright their entire state code? Could a municipal court prohibit distribution of court decisions?

Congress could, and should, clarify once and for all our long-standing public policy that edicts of government have no copyright in United States of America because the law belongs to the people. A simple amendment to the U.S. Copyright Act would clarify that in a free society, any person is free to read and speak the law.

Sincerely yours,

Raymond A. Mosley
Director of the Federal Register
(1996-2012)

Bruce R. James
24th Public Printer of the United States
(2002-2006)

Robert B. Reich
U.S. Secretary of Labor
(1993-1997)

John D. Podesta
Chief of Staff, President William Clinton
Counselor, President Barack Obama
(1998-2001, 2014-2015)

Vinton G. Cerf
Program Manager, Defense Advanced Research Projects Agency
(1976-1982)

Steven VanRoekel
Chief Information Officer of the United States
(2011-2014)

Joan Claybrook
Administrator, National Highway Traffic Safety Administration
(1977-1981)

Megan J. Smith
Chief Technology Officer of the United States
(2014-2016)

Robert C. Tapella
25th Public Printer of the United States
(2007-2010)

Judith C. Russell
Superintendent of Documents
(2003-2007)

David Michaels
Assistant Secretary of Labor (OSHA)
(2009-2017)

Aneesh Chopra
Chief Technology Officer of the United States
(2009-2012)

Pamela Gilbert
Executive Director, Consumer Product Safety Commission
(1995-2001)

Carol Browner
Administrator, Environmental Protection Agency
(1993-2001)

Alexander Macgillivray
Deputy Chief Technology Officer of the United States
(2014-2016)