

September 26, 2019

The Honorable Henry C. Johnson, Chair
The Honorable Martha Roby, Ranking Member
House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Johnson and Ranking Member Roby:

We write to you regarding the hearing on “The Federal Judiciary in the 21st Century: Ensuring the Public’s Right of Access to the Courts.”¹ In the digital age, access to court decisions is a critical component of the public’s right of access to the courts.

We have worked for almost thirty years to promote online access to judicial opinions. Back in the early days of Project Hermes, the Supreme Court proposed to release opinions in machine-readable format by means of floppy disks.² Legal publishers rightly said that there would be more effective ways to disseminate judicial opinions. But almost immediately concerns arose about the need to ensure public interest access to Court opinions in electronic formats. We noted at the time a report on legal education by former Vermont Governor Thomas P. Salmon, which found that the use of information technologies by smaller firms and sole practitioners was “sharply constrained by their cost and a severe shortage of public facilities.” We sought at that time to “avoid the creation of new information age divisions between information rich and information poor.”

In testimony later that year before the House Committee on Administration, we urged Congress to update the Depository Library Program to promote greater dissemination of electronic information.³ We noted that the absence of government information, such as the Congressional Record and Federal Register has “left a gaping hole in our country’s information landscape.” We said that “providing the GPO with the direction and the resources to make this information widely

¹ *The Federal Judiciary in the 21st Century: Ensuring the Public’s Right of Access to the Courts*, H. Comm. on the Judiciary, Subcomm. on Courts, Intellectual Property, and the Internet (Sept. 26, 2019), <https://judiciary.house.gov/legislation/hearings/federal-judiciary-21st-century-ensuring-public-s-right-access-courts>.

² Memorandum from Marc Rotenberg, Dir., Wash. Office, CPSR 1 (Jan. 1990), available at <https://epic.org/privacy/publicrecords/Rotenberg-memo-re-supreme-court-opinions.pdf>.

³ Testimony of Marc Rotenberg, Director, Washington Office, Computer Professionals for Social Responsibility (CPSR), on *H.R. 3849, The Government Printing Office Improvement Act of 1990*, before the Subcommittee on Procurement and Printing, Committee on House Administration, U.S. House of Representatives (Mar. 8, 1990), <https://epic.org/testimony/congress/Rotenberg-GPO-modernization-testimony.pdf>.

available to the public will promote broader understanding about our national government and greater participation in public affairs.”⁴

Over the years, we have also called attention to the privacy issues that arise from the online dissemination of court records, and we have sought – not to balance the competing interests of privacy and transparency but – to maximize both interests to ensure that access to court records is ensured and that privacy is protected.⁵

EPIC has long advocated for public access to court documents and other sources of law. Most recently, EPIC called on federal agencies to make statutes, regulations, adjudications, and relevant court documents freely available on agency websites.⁶ This is central to our form of government.

The First Amendment guarantees the public a right of access to courts, including access to court records and proceedings.⁷ This right is so fundamental that even prison inmates have a constitutional right to law libraries and legal assistance.⁸ The Supreme Court has also recognized a common law right to access, observing that “the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”⁹

The public’s constitutional and common law rights of access to the law are fundamental to a society governed by the rule of law. A myriad of rules, regulations, codes, ordinances, statutes, and common law decisions governs all aspects of American life. The ability of citizens to comply with law and to bring grievances in court require citizens to have easy and free access to what the laws actually permit and restrict.

⁴ *Id.*

⁵ EPIC, Comments on Privacy, Access and Court Records / Report and Recommendations of the Committee on Privacy and Court Records / Group Two, Florida Supreme Court (Feb. 28, 2006), *available at* <https://epic.org/privacy/publicrecords/flgp222806.html>; EPIC, Comments on Privacy and Access to Court Records, Administrative Office of Pennsylvania Courts (Nov. 9, 2005), *available at* <https://epic.org/privacy/publicrecords/paecfcomments.html>; EPIC, Comment on Privacy and Public Access to Electronic Case Files, Administrative Office of the United States Courts (Jan. 26, 2001), *available at* https://epic.org/open_gov/ecfcomments.html#1.

⁶ *See, e.g.*, EPIC, Comments on Managing Information as a Strategic Resource, Circular, Office of Management and Budget, No. A-130 (Dec. 4, 2015), <https://epic.org/apa/comments/EPIC-A130-Comments.pdf>.

⁷ *E.g.*, *Globe Newsp. Co. v. Super. Ct. for Norfolk County*, 457 U.S. 596, 604 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999) (“Indeed, every lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials.”).

⁸ *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (“We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”).

⁹ *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

The right to access also enables the public to monitor government agencies and inquire into the operation of the government.¹⁰ EPIC supports the right of public access to law in all forms. The public must have free and meaningful access to statutes, legislation, rules, regulations, adjudications, ordinances, codes, and case law at the local, state, tribal, and federal levels. Greater public access into the workings of the court system gives citizens tools to evaluate the court system, fosters greater confidence in government and the courts, and offers opportunities for scholars, journalists, and researchers to provide insight into the nature of government.

Unfortunately, much of American law is currently outside the reach of average citizens. Binding codes and legal decisions are often not online in a text-searchable or indexed format. Many states “rely on commercial services to post court briefs and decisions,” which then require a paid subscription.¹¹ Centralized commercial databases of local, state, and federal law also require subscriptions that cost thousands or millions of dollars a year.¹² And PACER—the federal judiciary’s centralized database of federal court records and documents—provides limited functionality but charges what can easily become prohibitively high fees.¹³

Brewster Kahle, a member of the EPIC Advisory Board and Founder at the Internet Archive told this Subcommittee in 2017, “In today’s world, public access means access on the Internet. Public access also means that people can work with big data without having to pass a cash register for each document.”¹⁴ The Internet Archive was established in 1996 to promote universal access to all knowledge.¹⁵ Anyone with a [free account](#) can [upload media](#) to the Internet Archive. The Archive “works with thousands of partners globally to save copies of their work into special collections.” Today the Internet Archive is one of the largest libraries in the world, harnessing the power of the Internet to make information freely available.

But for those seeking timely access to judicial opinions and other legal materials in the United States, it is a different story. The E-Government Act of 2002 makes clear that courts may charge fees “only to the extent necessary” for electronic access to information.¹⁶ The Committee report for the E-Government Act noted “The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported

¹⁰ *Id.* at 598.

¹¹ Erik Eckholm, *Harvard Law Library Readies Trove of Decisions for Digital Age*, N.Y. Times (Oct. 28, 2015), <http://www.nytimes.com/2015/10/29/us/harvard-law-library-sacrifices-a-trove-for-the-sake-of-a-free-database.html>.

¹² *Id.*

¹³ See Stephen J. Schultze, *The Price of Ignorance: The Constitutional Cost of Fees for Access to Public Court Records*, 106 Geo. L.J. 1197 (2018).

¹⁴ Letter from Brewster Kahle, Digital Librarian & Founder, Internet Archive, to Reps. Darrell Issa & Jerry Nadler, Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary (Feb. 10, 2017), <http://blog.archive.org/2017/02/13/internet-archive-offers-to-host-pacer-data/>.

¹⁵ About the Internet Archive, <https://archive.org/about/>

¹⁶ E-Government Act of 2002, Pub. L. No. 107–347, § 205(e).

primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible.”¹⁷ This has not happened. The Committee should follow through on Congressional intent and approve H.R. 1164, Electronic Court Records Reform Act of 2019, which would eliminate PACER fees for all users, greatly improving public access to the courts.

Thank you for your timely attention to this pressing issue. We ask that this statement be entered in the hearing record.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

¹⁷ S.REP. NO. 107-174, at 23 (2002).