

**THE FEDERAL JUDICIARY IN THE 21ST CENTURY:  
ENSURING THE PUBLIC'S RIGHT OF ACCESS  
TO THE COURTS**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON COURTS, INTELLECTUAL  
PROPERTY, AND THE INTERNET  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SIXTEENTH CONGRESS  
FIRST SESSION

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SEPTEMBER 26, 2019

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# **THE FEDERAL JUDICIARY IN THE 21ST CENTURY: ENSURING THE PUBLIC'S RIGHT OF ACCESS TO THE COURTS**

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**THURSDAY, SEPTEMBER 26, 2019**

HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE  
INTERNET  
COMMITTEE ON THE JUDICIARY  
*Washington, DC.*

The subcommittee met, pursuant to call, at 2:05 p.m., in Room 2141, Rayburn Office Building, Hon. Henry C. "Hank" Johnson, Jr. [chairman of the subcommittee] presiding.

Present: Representatives Johnson of Georgia, Nadler, Stanton, Roby, Collins, Chabot, Jordan, Biggs, Reschenthaler, and Cline.

Staff present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Moh Sharma, Member Services and Outreach Advisor; Madeline Strasser, Chief Clerk; Jamie Simpson, Chief Counsel, Courts & IP Subcommittee; Danielle Johnson, Counsel, Courts & IP Subcommittee; Matthew Robinson, Counsel, Courts & IP Subcommittee; Rosalind Jackson, Professional Staff Member, Courts & IP Subcommittee; Thomas Stoll, Minority Chief Counsel; Dan Ashworth, Minority Counsel; and Andrea Woodard, Minority Professional Staff Member.

Mr. JOHNSON of Georgia [presiding]. Welcome to the Subcommittee's second hearing in our ongoing examination of the state of the Federal Judiciary in the 21st century. Our first hearing focused on judicial ethics and accountability. Today's hearing shifts our oversight to an equally vital topic, the public's right of access to the business of the courts, a right centuries older than our republic and fundamental to our conception of justice in a democratic society.

To paraphrase an old judicial aphorism, it is not enough that justice is done. The public must all see justice being done. That is why images like the one that is on the screen, the long lines trying to get into the United States Supreme Court, are so troubling. This is the only way Americans can watch the Court's oral arguments. Lines start forming days before high-profile arguments. Often they are filled with people who have paid \$50 an hour to save someone a spot. Most of the people who make it inside are quickly rotated through a small courtroom, only able to hear a few minutes of the hearing.

These scenes are deeply disturbing to the ideal of an open and transparent judiciary. You can't make it out in this photo, but the words, "Equal Justice Under The Law," are inscribed above the doors of the Court. When the public see those words, they should see a message of welcome. I worry that instead they see a "keep out" sign. I understand that judges here today represent the Judicial Conference and cannot speak for the Supreme Court, but I do want to make sure we are all aware that it is images like this one that frame the debate.

This photo is also a reminder that today the question of whether our Federal courts are truly open is not answered by looking at whether the physical doors of our courtrooms stand ajar. Instead, the public's right of access must keep pace with the fact that we are entering the 3rd decade of the 21st century. That means that it is not enough to simply have case law recognizing the public's right of access to court records. There is a need to make sure that judges are scrutinizing even an uncontested motion to file court records under seal, especially when those records contain information that could be crucial to public health and safety. It means that the public shouldn't have to pay to see court filings.

The same goes for the public's right of access to court hearings. We need only look to State judiciaries to see what open justice means today. Nearly every State court system allows cameras in their hearing rooms, and many of them have livestreamed their proceedings for years. As the chief Justice of the Ohio Supreme Court writes, "Livestreaming increases trust in judges, in our decisions, and in the rule of law." Their experiences undermine some common counter-arguments about having cameras in courtrooms with the chief justice of the Michigan Supreme Court writing, "Some say TV cameras distract participants. In the courtroom, cameras are simply a fixture of proceedings, no more distracting than a podium or a chair, but just as necessary."

Before I yield to the Ranking Member, I need to recognize that our committee has a long bipartisan history of working to improve public access to our courts. Both Chairman Nadler and my colleague, Mr. Chabot, are long-time advocates of putting cameras in Federal courtrooms, as are Ms. Lofgren and Mr. Deutch. And, of course, one of the reasons we are having this hearing is because Ranking Member Collins' efforts to modernize access to court records and make it free has been important work. I am glad to be a co-sponsor of his and Mr. Quigley's bill.

Chief Justice Burger once traced the unbroken, uncontradicted history of public access to the courts that he noted was supported by reasons as valid today as centuries past. Today's hearing is about making sure that history remains unbroken by collaboratively and constructively resolving any contradictions in our shared responsibility to open justice in both principle and practice.

To our witnesses, I look forward to hearing your testimony on these important topics. I also hope you will be willing to work with us after this hearing. There is a lot that we can accomplish if we work together. Thank you, and I look forward to your testimony. And it is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentlewoman from Alabama, Mrs. Roby, for her opening statement.

Mrs. ROBY. Thank you, Chairman Johnson, and thank you to the witnesses from both panels for being here today to share their experiences with the Federal court system. Our two panels testifying today will cover many different topics, including the Public Access to Court Electronic Records system, also known as PACER, consolidating the Case Management/Electronic Filing system, audio and visual recordings in district and appellate courts, and changes to the standards for sealing court filings.

While some of these ideas are worth exploring further, I have significant concerns that some of the proposals will have a negative impact on judicial proceedings and the parties involved, especially cameras in courtrooms. I am particularly interested in hearing from our two distinguished district court judges here representing the Judicial Conference about their views on these ideas. So I really want to thank you both for being here and taking time out of your schedules to be with us.

The PACER system is currently widely viewed as outdated and difficult to use. If you ask almost any attorney or law student if they have used PACER, they will respond negatively and let you know how bad the system is. And while we should certainly be looking at ways to improve the system and modernize it, we must not do it in a way that deprives our court system of very much-needed funding. I look forward to hearing from our witnesses on different proposals for how we can improve PACER to work for everyone.

The Case Management/Electronic Filing system has been widely viewed as a success and has made it easier to electronically file and manage cases. However, every district and appellate court system operates their own system and much of this information can be fragmented. Hopefully we can hear today how this successful system can be improved upon and consolidated.

I have strong concerns, and I am opposed, to placing cameras within courtrooms. Our Federal courts here have important cases that can deal with highly-sensitive issues, national security concerns, and very heinous crimes. Having live broadcasts at these proceedings can place witnesses in jeopardy, subject jurors to intimidation, cause disruptions, and cast doubt over the outcomes of a case, amongst many other potential problems. Live broadcasts are simply something I am unable to support. I would like to hear from our witnesses about the feasibility of doing same-day audio or whether enough safeguards could be established to address the concerns that I have already outlined.

Finally, we will also hear from our witnesses about the standards for sealing documents and filings. This is a complex issue that highlights the differences in standards amongst the circuits and balancing the needs of the public and the rights of the parties involved. It is important that the public has access to as much information as possible, but I am very hesitant to restrict or second guess a judge's discretion to review motions to seal documents or settlements. I look forward to learning more about this topic and the difference in standards across our country. I am a strong believer in our Federal court system and ensuring the public's access to justice. So while we must always make sure our courts are work-

ing effectively and efficiently, I have some concerns with these issues before us today.

So I, again, want to thank our witnesses for being with us and hearing more about these proposals. And with that, Mr. Chairman, I yield back.

Mr. JOHNSON of Georgia. Thank you. I am now pleased to recognize the Chairman of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chairman NADLER. Thank you, Mr. Chairman, and thank you for holding this important hearing on the public's access to the courts. No one in this room takes for granted the complexity and importance of the Federal judiciary's job of administering justice and doing so fairly. That role is fundamental, but it is undermined when the public cannot see the judiciary's work being done. Every day Federal appellate judges across the country review complex cases of public interest, and each term the Supreme Court examines important constitutional and Federal issues that have a long-lasting impact on society.

Despite these courts' influence, only a few Federal courts have been in step with modern standards of access and have allowed visual media coverage or provided real-time audio streaming. And at the Supreme Court, the public must wait until the end of the week to hear recordings of oral arguments, with some exceptions. This means that most of the public rarely has the ability to see the courts' public deliberations as they happen in real time. Many people do not live near or even in the same State as their circuit court of appeals. They find it difficult to travel to Washington and stand outside for hours or even days or to pay someone to stand in line for them to witness history at the Supreme Court.

The public's right of access is fundamental, and it is not adequately protected when our courts fall far behind modern standards of media access. The realization of this right should not be left to the lucky or the wealthy or the well-connected few. In most Federal courtrooms, real-time access to court proceedings is no more available today than it was in the 19th century. The ability to stream from almost anyplace and on almost any device has also become so pervasive and inexpensive that this is the immediacy that the public has come to reasonably expect from their government.

The Federal judiciary's progress has been slow paced in this area, and our Federal courts have fallen behind their peers in the States and even courts abroad. Most State court systems allow livestream video of their proceedings. So do the supreme courts of the United Kingdom, Canada, and Australia. It is surprising and disappointing that our courts have been so willing to keep their doors closed and have so grudgingly allowed them to be open even a crack to the public. Live video ought to be the rule, tempered by judicial discretion, due process, and privacy concerns.

Many of my colleagues and I have long been advocates for increasing access to the courts through media coverage and real-time streaming of proceedings. On this front, last Congress, I introduced the Eyes on the Court Act, which would establish a presumption of audiovisual access to the Supreme Court and circuit court proceedings, but leave judges with the discretion to turn the cameras off when the interest of justice requires it. I anticipate reintro-

ducing this legislation, and I look forward to hearing the views of our witnesses on the bill and on the issue of cameras in the courtroom more generally.

Of course, accessibility and openness entail more than cameras and audio. It is critical that the public has a meaningful and modernized way to access court records, and I appreciate the leadership of Ranking Member Collins on efforts to reform the PACER system. I also look forward to discussing the disturbing trend of routine sealed court filings that conceal vital health and safety information from the public. I have been concerned for many years about secret settlements and protective orders that companies obtain to prevent the public from learning important information regarding the health and safety effects of their products. That is why I plan to reintroduce the Sunshine in Litigation Act, which would require that information relating to public health and safety and protective orders or settlement agreements be made public, unless a court makes a finding that there is a specific and substantial interest in keeping such information secret that outweighs the public interest. As two of our witnesses have documented, the problem of shielding critical health and safety information from the public extends also to sealed court filings, and I appreciate their work in bringing this issue to light.

Transparency is vital to the integrity of the judiciary, and it is vital to maintaining the public's trust in our courts, particularly as attacks on judicial independence and the rule of law have become more common. I am pleased that we are examining these issues today, and I am optimistic that today's hearing will lead to a productive dialogue about how the judiciary can best reach the public in a way that reflects modern standards and makes sense in this 21st century environment.

I know that Chairman Johnson sees today's hearing as part of an ongoing conversation and collaboration with our Federal courts, and so do I. I look forward to hearing from all our witnesses on these important topics, and I yield back the balance of my time.

Mr. JOHNSON of Georgia. Thank you. It is now my pleasure to recognize the distinguished Ranking Member of the Full Committee, the gentleman from Georgia, Mr. Collins, for his opening statement.

Mr. COLLINS. Thank you, my friend from Georgia. And, Mr. Chairman, I appreciate that. Before I start, I want to take just a moment, especially this first panel, our two judges, Judge Fleissig, and also my dear friend and mentor in many ways, Judge Story. Your contributions to the bench are amazing, and I appreciate both getting to know you, but watching literal history, Judge Story, in your life as you have lived that out in our circuit, in our district. Our district in Georgia is definitely the better for your service, and I appreciate that and your insight here as well as we go forward.

And I think many times we overlook the work of our judges, and, you know. And this is a committee in which we deal with it all the time, but it is also something which we also can celebrate. We may disagree on the outcome, but the judges are there to actually make sure that the folks in the world can look at us and see this is the most fair and equitable process that we can go through, and I want to thank both of you for being here. Our second panel is out-

standing as well. I have watched many of their commentaries on TV, and looking forward to their comments here as we go forward to do this.

And I want to thank the chairman and ranking member and, of course, the full chairman for being here and looking at this here. This is definitely, as you can tell by looking around, this is only for the true believers. This hearing is the Judiciary Committee at its purest, actually dealing with the judiciary and looking at what we deal with, and that is a good thing. And this subcommittee is valuable to that, and it is a way to promote public interest in judicial proceedings and protect parties' rights.

You know, the Federal Judiciary has always served its vital role by ensuring Americans have access to the fair and impartial system of justice. And for centuries, our Federal judicial system has been the pillar of our democracy because it has held itself to the highest of legal standards. But in the area of employing technology, well, maybe we need to catch up a little bit.

For example, let's look at the Federal court's outdated electronic records system, PACER. States like my home State of Georgia have electronic records systems that enable easy searches and free access to records, yet the Federal court records are very difficult to search through, and the system charges users to view each page. While State courts and law firms are in sports cars, the Federal courts are riding bicycles, and we need to make a change. The need to improve access to electronic Federal court records has long been a concern of mine. That is why I reintroduced the Electronic Court Records Reform Act to bring the Federal courts' electronic records system into the 21st century, and I look forward to considering and passing this legislation soon.

Transparency is important, but we must be careful not to create more problems than we solve. And I have significant concerns with proposals to put cameras into Federal courts because I have seen their impact here in Congress. Federal courts hear and adjudicate politically-charged and impactful cases every day. The addition of cameras to such contentious proceedings is likely to result in less trust and greater politicization of our courts. All we need to do is look at their effect on this Congress to see what a distractions and obstacles at times it can be.

Finally, I also have significant concerns with the effort to limit the discussion afforded district court judges to seal filings in instances where the disclosure of information would unnecessarily harm a party. Under current law, Federal judges have discretion to review requests to seal records and balance the public's First Amendment right to access against the party's right to protect their confidential information. It sort of amazing to me here sort of the double standard we use here. Many times my friends across the aisle want discretion for judges in sentencing, but they don't want to have discretion in judges for sealing cases when they are the closest to the cases to start with. I think we just need to find a common ground here, and we can do that. And with these two fine judges, I am sure they will have discussions on that.

Litigants in courts use tools, such as sealings, filings, and protective orders, to protect intellectual property, the personal information of individuals, and, as such, their financial and medical

records. Sealed filings and protective orders also expedite litigation by enabling parties to share sensitive documents relevant to the case without the risk of inadvertent disclosure or misappropriation. As we strive for transparency in our Federal court system, I must insist that we respect litigants' rights and confidential information.

In closing, I am thankful we are holding this hearing, and I am cautiously optimistic it will result in proposals that ensure transparencies and accountabilities without unintended consequences. We all have our ideas, and that is the place for this committee. And handling those ideas and finding good results is something I think we can all come together with. And with that, Mr. Chairman, I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Collins. I will now introduce the witnesses for the first panel. The Honorable Audrey Fleissig is a U.S. District Judge for the Eastern District of Missouri, and is the Chair of the Judicial Conference's Committee on Court Administration and Case Management. Before becoming a District Judge, Judge Fleissig was a magistrate judge on her court, a position she held from 2001 to 2010, and previously served as an Assistant U.S. Attorney and then U.S. Attorney in St. Louis. Judge Fleissig earned her bachelor's degree from Carlton College and her J.D. from the Washington University School of Law. And welcome, Judge.

The Honorable Richard Story is a Senior U.S. district judge for the Northern District of Georgia, and is a Member of the Judicial Conference's Committee on the Judicial Branch. Judge Story joined the Federal bench in 1998 after serving more than a decade as Chief Judge of the Superior Court of Georgia's Northeastern Judicial Circuit. Judge Story has also served as a judge for the Hall County Juvenile Court, as a special assistant attorney general for the State of Georgia, and in private practice in Gainesville, Georgia. Judge Story holds degrees from LaGrange College and the University of Georgia School of Law. Welcome, sir.

Before proceeding with testimony, I remind the witnesses that all of your written and oral statements made to this subcommittee in connection with this hearing are subject to penalties of perjury, pursuant to 18 U.S.C. Section 1001, which may result in the imposition of a fine or imprisonment of up to 5 years, or both.

Please note that your written statements will be entered into the record in its entirety, and, accordingly, I am asking that you summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired. I am sure that both of you would love to have such an arrangement in your courtroom.

Judge Fleissig, you may begin.

**STATEMENT OF HON. AUDREY G. FLEISSIG, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF MISSOURI; AND HON. RICHARD W. STORY, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF GEORGIA**

**STATEMENT OF HON. AUDREY G. FLEISSIG**

Judge FLEISSIG. Thank you. Chairman Nadler, Ranking Member Collins, Chairman Johnson, Ranking Member Roby, and members of the subcommittee, thank you for the invitation to testify today. Judge Story and I are here on behalf of the Judicial Conference of the United States, the national policymaking body for the Federal courts. I would remind you, as Conference witnesses, we do not speak for the Supreme Court.

I will briefly highlight four points. First, we are committed to the public's right of access to the courts. Secondly, we are continually working to improve the public's access to PACER. Third, proposals to change the Case Management system, or PACER, fee structure could have serious unintended consequences, both for public access and court operations. And fourth, the Judicial Conference has carefully developed policies on audio and video usage in both Federal trial courts and courts of appeals.

First, let me assure everyone that the Federal judiciary shares Congress' commitment to the public's right of access to the courts, which Federal judges must constantly balance with the rights of parties to the case. The primary mission of the court is to be accessible to the public as a fair and efficient forum for the resolution of cases and controversies between parties. Federal courts for hundreds of thousands of individuals and organizations is their chosen forum to seek justice, protect rights and liberties, and adjudicate disputes under law. Litigants' access to courts is, therefore, paramount.

Almost every step of the Federal judicial process is open to the public. All case opinions are available free to the world online. Case dockets are posted online, and anyone may attend court and may review case pleadings and other documents for free at a Federal courthouse. We have also developed a successful electronic filing system and a portal for court documents called PACER, which processed half a billion requests for documents last year.

Second, the judiciary is working to improve PACER and public access to PACER. Most users pay nothing to use PACER because of fee exemptions or waivers, which, effective in January, will be doubled. Of the remaining users, a small percentage of so-called power users pay the bulk of the fees. We have improved public access through other initiatives described in my written testimony and intend to continue to improve PACER with the advice of a newly-forming public access user working group.

Third, proposed changes to eliminate PACER fees and to reengineer the Case Management system could be unfair to litigants, greatly disrupt court operations, and would likely cost an enormous amount of time and money. Our Case Management and Public Access systems can never be free because they require over \$100 million per year just to operate. That money must come from somewhere. No additional taxpayer appropriations have been proposed. Remaining alternatives are to drastically increase the fees for liti-



gants seeking to file court cases or slash spending on essential court operations, such as clerks, probation officers, and courtroom hours.

The judiciary has serious concerns about the removal of the current funding mechanism with no replacement source of funds, effectively turning the PACER system and other elements of electronic filing into a massive unfunded mandate. Shifting funds from PACER users to litigants through increased filing fees would increase barriers to filing suit for many litigants and, thus, unduly hinder access to justice. Legislation proposes a new consolidated case management system, possibly even to include State court systems. Two examples in my written statement illustrate how hundreds of millions of dollars and many years of effort would likely be required to accomplish this. Allowing unlimited free access to PACER, along with a consolidated filing system, could impact the speed and reliability of the system and raise additional concerns regarding security, quality control, and data integrity.

Finally, regarding video and audio usage, we have carefully considered how they can be used to improve public access without jeopardizing the fairness and integrity of the proceedings. Today a member of the public can easily access on the internet an oral argument audio from any Federal court of appeals for free, and, in some cases, in real time, or appellate courts also provide video of some or all arguments. At the trial court level, recording of proceedings is restricted in order to preserve and protect the litigant's right to a fair and impartial trial.

Mr. Chairman and members of the subcommittee, thank you again for the opportunity to testify, and I will be happy to answer your questions. I request my full statement be entered in the record.

[The statement of Judge Fleissig follows:]

**STATEMENT OF**  
**THE HONORABLE AUDREY G. FLEISSIG**  
**JUDGE, UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF MISSOURI**

**ON BEHALF OF**  
**THE JUDICIAL CONFERENCE**  
**OF THE UNITED STATES**



**BEFORE THE SUBCOMMITTEE ON**  
**COURTS, INTELLECTUAL PROPERTY AND THE INTERNET**  
**OF THE**  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES HOUSE OF REPRESENTATIVES**

**HEARING ON PUBLIC ACCESS TO JUSTICE**

**SEPTEMBER 26, 2019**

Administrative Office of the U.S. Courts, Office of Legislative Affairs  
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee:

Good afternoon, I am Audrey Fleissig, United States District Judge for the Eastern District of Missouri. I am joined by Judge Richard Story, of the Northern District of Georgia. Thank you for inviting the Judiciary to testify on public access to federal courts. We are here on behalf of the Judicial Conference of the United States, the national policy-making body for the federal courts. I currently serve as Chair of the Judicial Conference Committee on Court Administration and Case Management (CACM). The responsibility of the CACM Committee is to study and make recommendations on matters affecting case management; the operation of appellate, district and bankruptcy clerks' offices; jury administration; and other court operational matters. Judge Story serves as a member of the Committee on the Judicial Branch. The responsibility of the Judicial Branch Committee is to address problems affecting the Judiciary as an institution and affecting the status of federal judicial officers.

Let me begin by assuring you and this Committee that the Federal Judiciary shares Congress's commitment to openness and accessibility of the courts and making the work of the courts as transparent as possible.

As Judges exercise the power vested in them by Article III of the United States Constitution, they do so with an eye towards balancing the rights of parties to the case, as well as the public's interest in judicial proceedings. These values of providing a forum for the pursuit of justice, fair proceedings, due process, equal protection, transparency, and public access have been hallmarks of the Federal Judiciary.

Today, as we focus on one of those foundational principles, public access, I would like to briefly discuss how that value is manifest in how the Judiciary conducts its business and how we open the courts to the public. The Federal Judiciary's work impacts the lives of the American

public in many ways. It is essential that the public has confidence in, access to, and understanding of the courts.

**The Federal Judiciary is committed to the principle of public access**

The mission of the Federal Judiciary is guided by the values of ensuring the availability of a fair trial and providing access to the courts and the adjudicatory process. For hundreds of thousands of individuals and organizations, the federal court is their chosen forum to seek justice, protect rights and liberties, and adjudicate disputes under law. It is the Judiciary's responsibility to ensure an impartial forum and to adjudicate disputes fairly. In ensuring fair adjudication, the courts must balance the other hallmarks of the pursuit of justice, including public access to the judicial process. The Judiciary's commitment to public access is evidenced by the fact that, with very limited exceptions, each step of the federal judicial process is open to the public. Any individual who wishes to observe a court in session may go to the federal courthouse and watch a proceeding.

There is a very strong presumption that all court proceedings are open to the public, though access may be limited in rare situations. In those cases, the courts work to balance the interests of a litigant's right to a fair hearing with the public's interest to open proceedings – weighing the privacy, deliberative, and public interest concerns.

**The PACER system provides free access to most users**

In addition to attending court proceedings, anyone may review case pleadings and other documents without charge by going to the clerk of court's office and viewing the case file on a public access terminal. Court dockets and case files also are available on the internet through the

Judiciary's Electronic Public Access (EPA) program. The EPA program provides electronic public access to court information in accordance with federal statutes, judiciary policies, and user needs. One component of the EPA program is the internet-based Public Access to Court Electronic Records (PACER) service, available at [www.pacer.gov](http://www.pacer.gov). PACER provides courts, litigants, and the public with access to court dockets, case reports, and the more than one billion documents filed with the courts through the Case Management/Electronic Case Files (CM/ECF) system. PACER is a portal to CM/ECF, making both systems integral to effective public access. There are approximately 2.9 million registered users of the PACER system and in fiscal year (FY) 2018 alone, PACER processed more than 507 million requests for case information.

### ***Part I***

#### ***Electronic Public Access to Court Records***

In 1992, Congress authorized the Judicial Conference to prescribe reasonable fees for access to electronic records (Pub. L. No. 102-140, Title III, § 303, 105 Stat. 782). Users of PACER are charged commensurate with the amount of data they access through the database, subject to exemptions and waivers. This user-based funding arrangement has worked well and has provided an unprecedented level of access to the federal courts, while providing a source of revenue to allow the Judiciary to maintain PACER, as well as to develop and introduce new technologies to expand public accessibility to court electronic records.

The Judiciary has endeavored to structure those fees in such a way as to maximize access to the public at large and avoid imposing unnecessary hardships on individuals. The Judicial Conference has established a fee exemption policy that automatically exempts or waives fees in four circumstances:

- (1) Judicial opinions are available free of charge;
- (2) Parties in a case (including pro se litigants) and attorneys of record receive one free copy of all documents filed in their cases;
- (3) No fee is charged for viewing case information or documents at courthouse public access terminals; and
- (4) No fee is charged when less than \$15.00 of fees are incurred per quarter – the current fee for one page is \$0.10 and there is a \$3.00 maximum charge for any single document, without regard to its length unless it's a transcript.

Last week, at its biannual meeting, the Judicial Conference of the United States approved an increase to the quarterly waiver from \$15.00 to \$30.00, effective January 1, 2020. When this increase is implemented, the doubling of the quarterly waiver will result in no fees being charged to approximately 77 percent of active users, based on data from 2018. These users will be able to access up to 300 pages of court documents in a given quarter for free. In addition to these automatic fee exemptions and waivers, the EPA fee schedule allows courts to exempt certain people or categories of people from payment, such as *pro bono* attorneys, non-profit organizations, indigent individuals, or academics and researchers.

**PACER's current structure fairly places the greatest cost burden on the system's largest users**

Those users who do incur fees often are so-called "power users," whose utilization of PACER far exceeds that of the typical user.

Approximately 87 percent of total PACER revenue comes from less than three percent of the active accounts. These "power users" are generally large commercial entities, some of whom use data accessed from PACER as the foundation of their own business models. Individual litigants are generally de minimis users of PACER's services and rarely incur any fees.

Revenue from PACER fees is expected to be approximately \$145.2 million during the current FY 2019, while the FY 2020 interim financial plan includes approximately \$159.3 million in projected EPA requirements. This revenue is used to pay for a variety of expenses related to maintaining electronic public access, including CM/ECF development, operations, and maintenance. Developing, maintaining, and modernizing a large, national database like PACER is resource-intensive, and the fee revenue is essential for the Judiciary to maintain electronic public access. These funds are also vital to the development of Next Generation CM/ECF (NextGen), the system which will replace the Judiciary's original electronic filing system. Additionally, the Central Sign-On feature available through NextGen has made access to the courts easier by simplifying the sign-on process for users by giving each user a single account to access NextGen in all courts. We recognize that some have questioned whether PACER fees should be spent on CM/ECF functions and other programs to enhance electronic public access. While these matters are still in litigation, it is not disputed that the vast majority of PACER revenues are spent exclusively on PACER and CM/ECF expenses, and any serious disruption to PACER funding will affect those critical systems the most.

**The Judiciary continually seeks to improve PACER and public access**

To improve PACER further, the Judiciary is establishing an EPA Public Users Group. The final selection process is underway for members of this group. These individuals will include representatives of the legal sector, media, academia, government, the general public, and other PACER users. They will provide valuable advice on the further development, implementation, and enhancement of EPA services.

Over the years, the Judicial Conference has approved several initiatives aimed at enhancing public access. In addition to PACER providing access to court documents, it now includes digital audio recordings of certain court hearings. Other initiatives include a multi-court voice case information system (McVCIS) that provides case information over the phone in English or Spanish, and a program to post court opinions on the Government Publishing Office's website. These initiatives demonstrate the Judiciary's commitment to ensure access to court information through multiple avenues without imposing a financial burden on the public.

**Proposed legislation to change the PACER fee structure could be unfair to litigants**

Current proposals in Congress would eliminate all PACER fees, even for commercial entities that profit from the use of its data. This means the Judiciary would be unable to spend PACER fees to support the CM/ECF system and other expenses related to electronic public access. The Judiciary has serious concerns about the removal of the current funding mechanism with no replacement source of funds, effectively turning the PACER system and other elements of electronic filing and public access into a massive unfunded mandate. In practical terms, the Judiciary would be forced to scale back public access services to fit within limited available resources, which could entail the cancellation of planned improvements to CM/ECF, decreased user support at the PACER Service Center, and/or decreased bandwidth and network support. This would result in a degradation of public access in terms of both quantity and quality.

Because large parts of the Judiciary's budget are out of its control, requiring the Judiciary to absorb the costs of its public access program within the remainder of its budget would come largely at the expense of Judiciary staff, including clerks' office employees and probation and pretrial services officers.



Proposed legislation, which authorizes the Judiciary to impose higher filing fees to cover the cost of maintaining the PACER system raises additional concerns. The Judicial Conference has long held the position that filing fees should not be increased to generate revenue for Judiciary operations. Funding PACER through filing fee increases would drastically shift the cost burden to litigants – who may not be proportionate users of PACER’s services or may not even use PACER at all. This would result in the well-resourced users of PACER, or “power users,” avoiding the payment of PACER fees, while individuals exercising their constitutional rights to seek redress through federal courts would be required to pay increased filing fees. Increasing the financial burden on litigants, in order for others to receive free PACER access, would essentially give large corporate users and highly-funded research institutions a free ride for their commercial and for-profit access at the expense of litigants. The added financial burden to litigants could possibly deter them from pursuing their claims in federal court. This is a major concern for the Judiciary and should be an important consideration for anyone considering PACER fee legislation. The idea of a litigant not having access to the courts because of cost prohibitive filing fees is unacceptable and contrary to the basic notions of access to justice.

The increase in filing fees that would be necessary to cover the cost of maintaining PACER would be substantial. A preliminary cost estimate shows that filing fees would have to be increased by approximately \$750.00 per case to produce revenue equal to the Judiciary’s average annual collections under the current public access framework. This would be a dramatic increase for litigants. It could mean that the current district court civil filing fee of \$350.00 (pursuant to 28 U.S.C. §1914(a)) would be increased to \$1,100.00 and filing fees in non-personal bankruptcy cases (i.e., cases filed under Chapter 11, which are already over \$1,000.00), would

increase to nearly \$2,000.00. Such a drastic increase to filing fees could deter litigants from filing cases due to the prohibitive cost.

In addition to the proposed increase in filing fees, one legislative proposal introduces a sliding-scale fee. A sliding-scale approach to filing fees, where the fee would be commensurate with the burden imposed on the court by the party, as proposed, would be administratively unworkable. Filing fees are paid at the outset of litigation, at which point it is unclear how much of a burden will be imposed on the court by a party. Irrespective of the cause of action, some cases are relatively straightforward, requiring minimal filings and court involvement, while others are complicated and time-consuming for the court to resolve. Trying to determine the burden on the court by the type of case filed, or some other standardized method, would be speculative, burdensome to court staff, and would likely prove to be inaccurate.

Additionally, the idea of imposing a lesser fee on filers who are filing on behalf of individuals presumes that these litigants impose lesser burdens on the courts. This is not necessarily the case. Class actions and multi-district litigation matters often impose a substantial burden on the court's time and resources; however, they would probably be subject to the lesser filing fee prescribed by the legislation as they are filed on behalf of individuals. Pro se litigants can also impose a significant burden on the court and the filing system through duplicative and excessive filings, but they would potentially be exempted from filing fees due if a hardship exemption continues to exist.

Furthermore, proposed legislation to give state courts the option to participate in the Federal Judiciary's electronic public access systems raises significant policy and technological concerns. There would be very specific system demands and architecture designs that would be required by any state's particular needs. It may prove exceedingly difficult and expensive, if not

impossible, to design an entirely new system from the start that could foresee these unidentified and potentially differing requirements from at least 50 other entities.

**Proposed changes to CM/ECF could greatly disrupt court operations**

While the PACER funding issue is one of the Judicial Conference's major concerns, the Conference also has serious reservations regarding proposed requirements for a new consolidated case management system and other technical specifications that would create another unfunded mandate. CM/ECF is the federal courts' case management and electronic case files system. It provides courts enhanced and updated docket management and allows courts to maintain case documents in electronic form. It allows the parties to file case documents, such as pleadings, motions, and petitions, with the court using a computer and internet connection.

Under federal statute, the Federal Rules of Civil and Criminal Procedure, and long-standing Judiciary policy, each court, through its Clerk of Court, is responsible for maintaining its own civil and criminal dockets. *See* 28 U.S.C. § 457; Fed. R. App. Pro. 45(b)(1); Fed. R. Civ. Pro. 79(a); Fed. R. Crim. Pro. 55. The Judiciary's current filing system does not constitute a "single filing system" and, therefore, would need to be overhauled.

Legislative proposals would require all documents made available to the public through this system be text-searchable and machine-readable. This requirement fails to address the fact that pro se litigants often file handwritten documents.

**Overhauling CM/ECF would likely take an enormous amount of time and money**

While it is extraordinarily difficult to project how much it would cost to replace the Judiciary's current system as directed by the bill, one thing is certain: doing so within two years is not possible.

In assessing how much it might cost to overhaul the Judiciary's case filing system, we have looked to other efforts in this area. California's attempt to create a single filing system for its state courts is instructive. California spent 10 years and more than \$500 million to build a single filing system for its state courts before abandoning the effort, which was projected to cost a total of \$2 billion to complete. See Howard Mintz, *California Courts Scrap \$2 Billion Tech Project*, Mercury News, March 27, 2012, <https://www.mercurynews.com/2012/03/27/california-courts-scrap-2-billion-tech-project/> (last visited September 9, 2019). The new system would have replaced the patchwork of aging systems that varied by county and did not interact with each other. Similarly, the Federal Bureau of Investigation (FBI) first spent \$170 million over four years on its initial effort to create a Virtual Case File records management system, only for the entire project to be declared a total failure. See John Foley, *FBI's Sentinel Project: 5 Lessons Learned*, Information Week, August 2, 2012, <http://www.informationweek.com/applications/fbis-sentinel-project-5-lessons-learned/d.d-id/1105637?> (last visited September 19, 2019). The FBI then had to completely start over, spending an additional \$425 million over the course of another six years to get the new Sentinel case file system up and running, encountering missed deadlines, budget overruns, and other project management problems along the way, as well as significant employee complaints about the case searching function and other user concerns continuing for several years after completion. See Jeff Stein, *FBI's Expensive Sentinel Computer System Still Isn't Working*,

*Despite Report*, September 24, 2014, <https://www.newsweek.com/his-expensive-sentinel-computer-system-still-isnt-working-despite-report-272855> (last visited September 19, 2019).

Based on the experiences of California and the FBI, upgrading the current Judiciary filing system, as directed by the bill, could easily cost \$2 billion to accomplish and could take more than 10 years to complete. Significantly, the legislative proposals do not include a funding mechanism to finance consolidation costs, thus creating a huge unfunded mandate which would adversely impact the Judiciary's ability to create the consolidated system Congress is seeking.

#### **Allowing unlimited free access to PACER could create system risks**

In addition to funding concerns, we have identified other policy and technical issues that must be carefully considered. The elimination of the PACER fee, coupled with the legislation's requirement that CM/ECF be consolidated into a single system, could have a negative and severe impact on the speed and reliability of the system. The current fee-based system, which requires users to register and allows traffic to be monitored, prevents users from downloading unlimited and voluminous content – unless they are willing to pay for that access. Completely free access for all members of the public (who could download as much information as they want with no cost constraints) could dangerously strain the system's capacity and performance.

The system has previously experienced serious performance issues caused by users running automatic scripts to extract large amounts of data. At that time, the Administrative Office of the U.S. Courts (AO) was able to work to resolve the issue – in part – because the fee-for-service model was in place. This model requires users to register for an account and allows their level of usage to be tracked. Consequently, the AO was able to identify the users in question and work with them to discuss modifying their use pattern, i.e., running the scripts at

off-peak hours, while the AO worked to establish a technical fix that would address the problem in the future. The fee-for-service model, which charges users commensurate with their use, makes it less likely that users will engage in this type of behavior, because it would result in large PACER charges. If the fee-for-service model were dismantled, however, there would be no incentive preventing users from running these types of automatic scripts to extract large amounts of data from the system in a way that can severely impact system performance for filing users. Moreover, as discussed above, the ability for anyone to access an unlimited amount of data from the system could exacerbate capacity issues.

The Judiciary is charged with ensuring the availability of a fair forum for resolution of cases and controversies, while balancing the public's need for reliable and convenient access to the courts. The Judiciary takes this charge seriously. Recent initiatives to establish higher fee waiver thresholds, develop an electronic public access user working group, provide access to telephonic case information in English and Spanish, post court opinions on GPO's website and make available digital audio recordings of hearings on PACER, demonstrate our commitment to promoting efficient electronic public access without placing unreasonable burdens on the public or on access to justice.

## ***Part II***

### ***Audio and Video Access to Federal Court proceedings***

Another example of how the Judiciary provides public access to the courts is how we use audio and video resources to engage and inform the public. Before I begin my testimony on this issue, I must emphasize, as have other judges testifying in previous years, that the Judicial Conference does not speak for the Supreme Court. My statements, therefore, are strictly limited

to policies applicable to federal district courts and courts of appeals, and do not address the broadcasting of Supreme Court proceedings.

**The federal courts have cautiously permitted video and audio access over time**

As I previously emphasized, the primary purpose and mission of the federal courts is to adjudicate disputes fairly and impartially, and we strive to do so while also providing the greatest feasible degree of public access to the proceedings. Over the years, the Judicial Conference has carefully considered how audio and video technology can be used to improve public access to trial and appellate court proceedings without jeopardizing the fairness and integrity of those proceedings. Today, a member of the public can easily access an oral argument from any federal court of appeals on the internet—in some cases in real-time, as the argument is happening before the panel. Four appellate courts also provide video of some or all appellate arguments. At the trial court level, audio and video coverage of trial court proceedings is restricted. The Judicial Conference has found that this step is necessary to preserve and protect the litigants' right to a fair and impartial trial. Access to trial court proceedings, however, remains open to the public to attend in-person, and the parties' filings, the trial transcript, and the opinions issued in these cases are available to the public online in multiple locations.

Following two multi-year, in-depth studies of the issue of whether cameras should be permitted in federal courts, the Judicial Conference has carefully developed policies on cameras and broadcasting that strike a balance between recognizing the right of public access to judicial proceedings and protecting litigants' rights to fair and impartial proceedings in both federal district courts and courts of appeals. I will describe how those policies apply to both the courts of appeals and the district courts below. Finally, I will provide a brief history of the

Conference's consideration of the cameras issue, which will demonstrate the time and effort it has devoted to understanding this issue over the years.

**Audio of appeals courts proceedings is universal, and video coverage is authorized**

The Judicial Conference has authorized each court of appeals to decide for itself whether to permit cameras in appellate proceedings. Consistent with this policy, four of the 13 federal courts of appeals have adopted policies that permit video coverage of appellate proceedings, subject to the circuit's practices and procedures. Today, the Second, Third, Seventh, and Ninth Circuits allow camera coverage in certain appellate proceedings.

The Judiciary's policy of leaving it up to each circuit's determination whether to allow video coverage ensures that each circuit can consider and develop its own procedures based on what is best for that court, while balancing the interests of the parties to the cases and the public. The courts of appeals are transparent and open about these procedures. The Ninth Circuit live streams audio and video of every court proceeding, including all *en banc* oral arguments, and posts each recording to its website. The Third and Seventh Circuits post video recordings of selected proceedings. Both circuits allow a party to object to a video being posted, subject to the panel's ultimate decision. The Second Circuit allows live video coverage of appellate arguments in civil cases on a case-by-case basis.

While each of the four circuits that currently permit video coverage has approached the practice differently, this discretion has allowed each court of appeals to develop procedures that fit the court's local rules and internal operating procedures, while also responding to fairness considerations in individual appellate proceedings.



Significantly, the public's access to appellate proceedings is not limited to those circuits that allow video coverage of hearings. Rather, *every* court of appeals posts audio recordings of oral arguments on its public website, which any member of the public can listen to and download at no cost. In fact, four appellate courts—the Second, Fourth, Ninth, and District of Columbia Circuits—live stream audio of some oral arguments. The Second Circuit recently allowed live streaming of an oral argument on C-SPAN's website. Thus, even if a circuit has not adopted a policy permitting cameras, the public still has access—in some cases immediate, real-time access—to audio of the hearing.

The audio currently provided by circuit courts (whether as live streaming or through downloadable files) accomplishes the goal of ensuring public access to appellate court proceedings. In appellate oral arguments, the attorneys do not call witnesses to testify, introduce evidence such as photos or documents, or raise objections. Instead, the attorneys present oral arguments from a podium and answer questions from the panel of judges—all of which is aptly captured by the audio recordings. There is rarely a visual component that needs to be memorialized or made available in appellate proceedings. Requiring circuit courts to provide video streaming or downloadable video, therefore, would not significantly enhance the public's access to the proceedings, but would cause the circuit courts to incur additional costs to provide the streams and store the electronic files.

#### **The use of cameras in trial courts raises significant due process concerns**

There are different considerations in the district (or trial) courts. After careful consideration and two multi-year studies, the Judicial Conference has consistently expressed the view that camera coverage can cause irreparable harm to a citizen's right to a fair and impartial

trial. The Conference believes that the effect of cameras on litigants, witnesses, and jurors can have a profoundly negative impact on the trial process. In civil and criminal cases, cameras can intimidate defendants who, regardless of the merits of the case, might prefer to settle or plead guilty rather than risk airing damaging accusations in a televised trial. Cameras also create security and privacy concerns for individuals, many of whom are not even parties to the case, but about whom personal information may be revealed at trial.

#### Historical Background on Cameras in the Federal Courts

Whether to allow cameras in the courtroom is not a novel question for the Federal Judiciary. Electronic media coverage of criminal proceedings in courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that “the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.” In 1972, the Judicial Conference adopted a prohibition against “broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto . . .”. The prohibition applied to both criminal and civil cases.

Since then, the Conference has repeatedly studied and considered the issue. In 1988, Chief Justice William Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended that a three-year experiment be established permitting camera coverage of certain proceedings in selected federal courts. In 1990, the Judicial Conference adopted this recommendation and authorized a three-year pilot program allowing photographing, recording,

and broadcasting of civil proceedings in six district and two appellate courts, which commenced July 1, 1991.<sup>1</sup>

The Federal Judicial Center (FJC) conducted a study of the pilot project and submitted its results to a committee of the Judicial Conference. After reviewing the FJC's report, the Conference decided in September 1994 that the potential intimidating effect of cameras on some witnesses and jurors was cause for considerable concern such that it could impinge on a citizen's right to a fair and impartial trial. The Conference, therefore, concluded that it was not in the interest of justice to permit cameras in federal trial courts.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue and urged each circuit judicial council to adopt, pursuant to its rulemaking authority set forth in 28 U.S.C. § 332(d)(1), an order reflecting the Conference's September 1994 decision not to permit the taking of photographs or radio and television coverage of proceedings in federal district courts. The Conference also voted to strongly urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1). With respect to appellate courts, the Conference "agreed to authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt."

Fifteen years later, in September 2010, the Judicial Conference authorized another pilot program to evaluate the effect of cameras in district court courtrooms, video recordings of

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<sup>1</sup> The courts that volunteered to participate in the pilot project were the U.S. Courts of Appeals for the Second and Ninth Circuits, and the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of New York.

district court proceedings, and publication of such video recordings. Fourteen district courts<sup>2</sup> participated in the pilot, which ran for four years (from July 18, 2011 to July 18, 2015). For the pilot, the courts themselves recorded and edited proceedings (e.g., trials, routine motion hearings, and evidentiary hearings), with the parties' consent and the presiding judge's approval. Unless the parties objected, or the presiding judge decided not to make the recordings publicly available, the recordings were posted by the court on the Judiciary's public website at <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/case-video-archive>.<sup>3</sup> Over the four-year period, 158 proceedings were recorded and posted—approximately 10 percent of the proceedings that were eligible. The number of proceedings recorded in individual pilot districts ranged from 0 to 34. Significantly, in approximately 85 percent of eligible proceedings, at least one party declined to consent to have the proceeding video recorded.

The FJC analyzed the results of the pilot and submitted a report to the CACM Committee in November 2015. In December 2015, the CACM Committee reviewed the report and had an extensive discussion of the FJC's findings. First, the Committee found that, based on the number of proceedings recorded and posted and the number of times those postings were viewed, there was a low level of interest in recording the proceedings, both from the parties themselves and the judges, and viewing the recorded proceedings by public. Second, the Committee noted that while the FJC's report detailed some positive reactions from participants in the pilot, it also

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<sup>2</sup> The 14 pilot courts were: the U.S. District Courts for the Middle District of Alabama, Northern District of California, Southern District of Florida, Guam, Northern District of Illinois, Southern District of Iowa, Kansas, Massachusetts, Eastern District of Missouri, Nebraska, Northern District of Ohio, Southern District of Ohio, Western District of Tennessee, and Western District of Washington.

<sup>3</sup> The videos could be searched by (1) district, (2) type of proceeding (e.g., jury trial, summary judgment motion), and (3) subject matter (e.g., personal injury, civil rights, habeas corpus, trademark infringement).

identified a number of significant concerns, including how cameras influenced the behavior of attorneys, witnesses, and jurors. These concerns were particularly troubling to the Committee given the fact that the Judiciary's most important responsibility is to ensure the availability of a fair trial to the parties in a case. Finally, the Committee noted there were significant costs associated with the equipment, labor, and video hosting.

Ultimately, the Committee concluded that the cameras pilot program did not produce sufficient or persuasive evidence of a benefit to the judicial process to justify the negative effect upon witnesses or the significant equipment and personnel costs. Therefore, the Committee agreed not to recommend any change to the Judicial Conference's policy regarding cameras. The March 2016 Judicial Conference considered the CACM Committee's report and declined to take any action modifying its long-established position on cameras in the courtroom at the trial court level.

I should note that the Ninth Circuit Judicial Council, in cooperation with the Judicial Conference, has authorized three districts in the Ninth Circuit that participated in the pilot program (California-Northern, Washington-Western, and Guam) to continue the pilot program under the same terms and conditions to provide longer term data and information to the CACM Committee and the Judicial Conference. Since the pilot program ended in July 2015, the three district courts have posted 36 proceedings on the [uscourts.gov](http://uscourts.gov) website, which have had a cumulative total of 12,413 views, with views of each proceeding ranging from 2 to 1,026.

It is important to note that while video coverage of trials is not permitted under the current policy, the policy does permit the use of cameras—as well as audio recording and photography—in several situations, most of which are designed to assist in the administration of justice. Specifically, a judge may authorize broadcasting, televising, recording, or taking

photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. Aside from these proceedings, a judge may authorize broadcasting, televising, recording, or photography in the courtroom: (1) for the presentation of evidence; (2) for the perpetuation of the record of the proceedings; (3) for security purposes; (4) for other purposes of judicial administration; (5) for the photographing, recording, or broadcasting of appellate arguments; or (6) in accordance with pilot programs approved by the Judicial Conference. For example, proceedings can be broadcasted to overflow courtrooms. In those situations when broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will: (1) be consistent with the rights of the parties; (2) not unduly distract participants in the proceeding; and (3) not otherwise interfere with the administration of justice.

As evidenced above, the Federal Judiciary consistently evaluates and balances its shared goals of ensuring an impartial and fair adjudicatory process to the parties involved with the public interest and access to the work of the courts. Conducting this balance ensures public confidence and trust in our judicial system, while maintaining the fundamental pillars of the Judiciary.

Additionally, there are distinctive differences in the branches of governments' interests in televising their proceedings. For the legislative and executive branches, the general public has a voting interest in the input and outcome of bills, law, and politics initiated in those branches. The Judicial branch is different. Although the public has an interest in the outcome of cases before the Judicial Branch, the Judiciary's role is to resolve conflict between two litigating parties. Those parties' interests in a fair adjudication of their conflict can be very different from the public's at large. Cameras in the courtroom could have an intimidating effect on witnesses,

litigants, and jurors. They can be used as a pre-trial negotiating tactic to the point of eliminating a trial entirely. They raise privacy concerns for witnesses and safety concerns for parties, witnesses, and jurors. These issues are very different concerns than interests the other two branches have. We believe strongly that this is an issue best left to the courts to decide for themselves, and that comity among the branches to determine their own procedures should be honored.

Mr. Chairman and members of the Subcommittee, thank you again for the opportunity to testify and present these views. I will be pleased to answer any questions you or the other members of the Subcommittee may have and request that my full statement be entered into the record.

Mr. JOHNSON of Georgia. Thank you, Judge. Judge Story, you may begin your testimony.

**STATEMENT OF HON. RICHARD W. STORY**

Judge STORY. Committee Chairman Nadler, Ranking Member Collins, Subcommittee Chair Johnson, and Ranking Member Roby, good afternoon. I am pleased to be here to testify on the topic of ensuring the public's right of access to the courts. I have to say I would be remiss if I didn't just momentarily thank Congressman Collins for his very kind words. I appreciate those words. And I will say also that this is even more special for me because being from the Northern District of Georgia, this is the first time I have appeared before a congressional committee since my confirmation hearing. To have the Chair be from the Northern District of Georgia and to have the Ranking Member of the committee from the Northern District of Georgia, that is a special aspect for me as well. So thank you very much for this opportunity.

I want to assure you that each Federal court and—

Mr. JOHNSON of Georgia. I will gladly grant you an additional minute on your time. [Laughter.]

Judge STORY. I will try not to need it, Chairman. Thank you. I want to assure you that every Federal court and every Federal Judge takes very seriously the subject of public access to the courts. Federal judges adhere to a presumption of openness whereby court proceedings are open to the public. That presumption also applies to court records, including documents filed by litigants in the case, written orders and decisions issued by the judges. Sometimes judges are asked to balance the right of public access with a litigant's request for confidentiality. In my brief remarks to you, I will focus on how judges weigh those competing interests.

Let me first point out an important distinction between protective orders and sealing orders. In the early state of litigation, the parties engage in discovery. Typically, material exchanged in discovery, which, let me assure you, in this electronic age can be massive, are not filed with the court typically. Parties often ask the court to enter a protective order to govern the disclosure of certain materials that are exchanged during that discovery process. If protective orders were not entered, the parties would have to litigate over the protection of their confidential materials, causing the case to likely bog down and become much more costly for the litigants.

Even so, most courts are very circumspect about entering protective orders. We endeavor to draw such orders in as narrow a fashion as possible so as to allow meaningful public disclosure while affording some protection to the litigants. Once parties file materials with the court as part of the adjudicative process, they must be made a part of the public record unless the court enters an order that seals those documents. Again, realizing that a sealing order places a matter outside the public purview, the courts impose a significant burden on the party that is requesting the materials be sealed.

The primary mission of the courts is to provide a fair and efficient forum for the resolution of real controversies between both public and private parties. In exercising our constitutional duty, a judge has a certain level of discretion in hearing an individual case.



When a request for sealing is made, the judge weighs the need for confidentiality against the public presumptive right of access to court proceedings and records. The law recognizes if there are situations where that access must yield because of a party asserts a compelling interest in protecting that information from the public for reasons such as intellectual property, trade secrets, or private, personal information.

On occasion, there are good reasons for courts to grant a litigant's request to keep parts of the proceedings confidential. In deciding to seal material in cases, judges must consider and articulate why the interests and support of non-disclosure are compelling, why the interests supporting access are less so, and why the seal is no broader than is necessary.

Even when a document is sealed, courts continue to take the public's right of access into account. The specific requirements of binding case law varies somewhat from district to another, but I have included in my written testimony some examples of that. But because there are so many competing interests to be considered in every case, the best approach is to allow the trial judge to have discretion concerning the sealing of documents. He or she is in the best position to do so based on the facts of the case, governing case law, and the district's local rules and practices.

Keep in mind that a judge's decision to seal is subject to appeal. The strength and thoroughness of the appellate process provides reviews and checks on those decisions. Also third parties have the ability to intervene and assert the rights of public access to documents as well.

Thank you for the opportunity to address you here today. Let me close where I began. All Federal courts and all judges take very seriously public access to the work of the courts. That is how we are justified in the public having confidence in what we are doing, and they do have to be able to have access to that, and we understand that and appreciate it. And I look forward to answering any questions that you may have. Thank you.

[The statement of Judge Story follows:]

**STATEMENT OF**  
**THE HONORABLE RICHARD W. STORY**  
**SENIOR JUDGE, UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF GEORGIA**

**ON BEHALF OF**  
**THE JUDICIAL CONFERENCE**  
**OF THE UNITED STATES**



**BEFORE THE SUBCOMMITTEE ON**  
**COURTS, INTELLECTUAL PROPERTY AND THE INTERNET**  
**OF THE**  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES HOUSE OF REPRESENTATIVES**

**HEARING ON PUBLIC ACCESS TO JUSTICE**

**SEPTEMBER 26, 2019**

Administrative Office of the U.S. Courts, Office of Legislative Affairs  
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee:

Good afternoon, I am Richard W. Story, United States Senior District Judge for the Northern District of Georgia. I am pleased to be here with Judge Fleissig, on behalf of the Judicial Conference of the United States. I currently serve as a member of the Judicial Conference's Committee on the Judicial Branch. The responsibility of the Branch Committee is to address problems affecting the Judiciary as an institution and affecting the status of federal judicial officers.

Thank you for inviting representatives of the Judiciary to testify today on the issue of public access to federal courts. As Judge Fleissig describes in her testimony, the Federal Judiciary has a long history of fostering transparency and accountability in the federal courts and of educating the public regarding the judicial process. With certain very limited exceptions, each step of that process is open to the public: from initial filings, to hearings and trials, to orders and opinions issued by the court, and to parts of the record relied upon by a judge. By conducting our judicial work in public view, public confidence in the courts is enhanced, and citizens learn first-hand how our judicial system works.

You have heard testimony about public access to court proceedings and case files. In addition, every federal court maintains a website with information about judges, local rules and procedures, calendars of events and proceedings, as well as information for jurors, litigants, and the general public. A list of these local court websites is available to the public on the Judiciary's official website at [www.uscourts.gov](http://www.uscourts.gov). Let me describe some other ways in which the Federal Judiciary fosters public access to and understanding of the courts.

In many respects, the Federal Judiciary is more open than any other part of government – through jury service. Jurors do not merely observe a governmental function, they directly participate in it. The jury process is a fundamental element of our democratic process and constitutional order, enshrined in Article III of the Constitution and the Sixth and Seventh Amendments. Last year over 195,000 citizens were present for jury selection or orientation in our trial courts. While jury deliberations are not open to the public, the verdict that jurors reach is essential to the resolution of conflicts in our courts and, with few exceptions, are announced in open court. The Constitutional protection of rights and liberties in federal courts is the responsibility of both judge and jury.

Judges' decisions and the explanations for those decisions, are made public, in writing for all to see, free of charge. Appellate opinions and district court opinions are reported and are made available to the public online through court websites, PACER, and the Government Publishing Office's [www.govinfo.gov](http://www.govinfo.gov) website.

Federal courts hold a wide variety of public events that educate students and members of the public about court operations and our system of justice. Courts hold ceremonies throughout the year where United States citizenship is formally granted, and new Americans are officially welcomed into our citizenry. Many are held on or around September 17 to celebrate Constitution Day and Citizenship Day. These naturalization ceremonies are conducted in courthouses, community landmarks, and national parks, are open to the public, and may be attended by hundreds and sometimes thousands of people. I hope you have had the opportunity to participate in these inspiring ceremonies. I would encourage you to do so.

Throughout the year, federal courts open their doors to provide experiential learning, mark legal milestones, and celebrate heritage months with educational activities and multi-media

resources. Here is just a sampling of events the Federal Judiciary uses to maintain and enhance public understanding of the courts:

**Open Doors to Federal Courts** – This is a national initiative federal judges use to help the public understand what they do each day, and typically includes realistic simulations of court proceedings. Educators and attorneys work with federal judges in their courtrooms or team up with students in classrooms to apply Supreme Court precedents to fact patterns derived from recent events.

**Law Day** is celebrated on May 1 and throughout the entire month of May. Courts frequently use this as an opportunity to provide a variety of interactive classroom activities for this celebration.

**Anniversary of the Federal Court System** – Just two days ago we celebrated the 230th anniversary of a groundbreaking American innovation—the creation of a federal court system, separate from the individual state courts. The Judiciary Act of 1789, one of the first Acts of the First Congress, was signed into law by President George Washington on September 24, 1789.

**Bill of Rights Day** – This important day is observed on December 15 and throughout the month of December.

**Heritage Months** – We celebrate diversity and use law-related resources to explore the nation's legal and cultural heritage such as African American History Month, Women's History Month, Asian Pacific American Heritage Month, and Hispanic Heritage Month. These important civic events, conducted in courtrooms and in the community, present another great opportunity for enhancing public understanding of the federal courts.

You can learn more about court civic education resources and programs on the judiciary's internet site at: <https://www.uscourts.gov/about-federal-courts/educational-resources>.

**Public Access to Court Proceedings and Records is a Core Value of the Judiciary**

As an initial point, I want to emphasize that the right of public access to court proceedings and records is fundamental. The interests of justice, free speech, and democracy depend on the public's awareness of the justice system and how courts serve the community. The Federal Judiciary – each federal court, and every federal judge – takes this public access right seriously, and actively endeavors in each case to ensure that the right is protected. Federal judges adhere to a presumption of openness whereby court proceedings, such as trials and hearings, are open to the public. That same presumption of openness applies to court records, which include the documents that litigants file in a case, as well as the written orders and decisions that judges issue over the course of their cases. Each case filed in federal court is assigned a case file number and entered into the record. Except in limited circumstances, the filed documents are available to any member of the public and can be accessed either at the courthouse or remotely through PACER.

**The Public Right of Access is Not Absolute, and Has Tailored Exceptions**

There are, however, circumstances when a party requests that a particular document, although filed and made part of the court record, is restricted from public access. As I will explain, this practice—“sealing”—is rooted in common law and ensures, in those circumstances where a compelling reason exists and a party requests, a judge can determine that a court record can be withheld from public disclosure when requested by a party. The tension here is obvious. On one hand, there is the public's interest and certain common law rights to access and inspect court records. But on the other hand, the law recognizes that there are situations where that right must yield to the compelling interest of a party to the case in protecting that information from

public disclosure, such as the protection of personal information, trade secrets, and the names of minors, and to limit adverse publicity that would endanger the ability to hold a fair trial.

For instance, there may be good reason to seal documents in a patent case, where the parties will exchange voluminous and propriety information regarding their processes and sales. This information, if disclosed, could easily place the parties at a disadvantage with competitors who are not parties to the case. Thus, the information is typically exchanged pursuant to a protective order, and if pertinent to a court filing, may be excerpted (or sealed) in the public court filings. While mindful of the public's right of access to the courts, judges must balance that right against the litigants' right to a fair forum. A litigant should not have to jeopardize its competitive position in the marketplace in order to adjudicate a patent suit. If the case goes to trial, the judge will be able to determine what information from the discovery is in fact relevant, and the relevant information will routinely be disclosed in the public court proceeding.

The federal court system operates as a decentralized entity. Each federal court, while subject to federal rules of procedure and statutes, also has the ability and authority to create its own local rules. Beyond that, each judge has a certain level of discretion when hearing an individual case. This allows judges to take a tailored approach to each case they hear - taking into account the particular facts and circumstances with which they are presented. This is important. Every case is unique and must be treated accordingly.

Sealing is a tool used by judges when a party states that a need for confidentiality exists. A judge has the discretion to weigh the party's request for confidentiality against the public's right of access. On occasion, however, there are good reasons for courts to grant a litigant's request to keep parts of some proceedings confidential. Sometimes, refusing to protect confidential interests of a party may thwart settlement and prolong litigation, thus increasing

costs of the parties, and perhaps, affecting the recovery of the plaintiff. Ultimately, the appellate process provides an integral check on judges' decisions to seal material in cases, ensuring that district judges consider and articulate why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the restriction on access is no broader than necessary. Let me begin, now, by making an important distinction between sealing and protective orders.

**Protective Orders Under Federal Rule of Civil Procedure 26(c) Represent a Distinct, But Important, Case Management Tool**

Though the two are often conflated, a very important distinction exists between orders to seal court records and “protective orders” entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26. The starting point for every civil case is the “complaint”—which is the document where a plaintiff sets forth the facts and legal claims for relief and identifies the individuals or entities, i.e., the defendants, against whom those claims are asserted. In most cases, each defendant will file an “answer,” wherein the defendant responds to the allegations in the complaint and sets forth any defenses to the plaintiff’s claims. These documents, known as the “initial pleadings,” are filed with the court and made part of the public record of the case. The parties then exchange information and documents about the allegations and defenses in the case through a process called “discovery.” It is important to remember that the primary mission of the Judicial branch is to provide a fair and efficient forum for the resolution of real controversies between both public and private parties.

The information the parties exchange during discovery is not filed with the court at this preliminary stage of the litigation -and for good reason. To foster the truth-seeking process, the rules, by design, permit broad discovery information. Thus, the discovery is often voluminous.



The parties exchange information that might be privileged and might not prove relevant to their case and information that may not ever be used in any court filing or court proceeding. To encourage the exchange of information, it is not uncommon for a district court to find “good cause” to enter a protective order that limits the use or disclosure of materials and documents obtained in discovery. Federal Rule of Civil Procedure 26(c) allows a court to issue a protective order “for good cause... to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” These protective orders prevent a party from disclosing information obtained through discovery for any purpose other than the litigation. This generally helps move the litigation forward to a merits-based resolution without getting mired down in discovery disputes, since the parties have assurance that the materials they exchange with each other will not go beyond each other unless they wind up being utilized in the litigation. Ultimately, the more private nature of discovery practice helps parties expeditiously and efficiently obtain materials from opposing parties and winnow down the overall scope of issues and facts, without having to engage in the time consuming and expensive review that would be required if everything that passed between them would be opened up to the world. Likewise, parties sometimes enter into private confidential settlements that are never filed or presented to the court. In those instances when the blessing of the court is not required for settlement, the court has no control over the public’s access to information.

Over the years the Judicial Conference and its Standing Committee on Rules of Practice and Procedure have administered and updated the procedural rule, as needed, through their extensive rule-making processes. They have, however, consistently found that Rule 26(c) protective orders allow for the effective and fair administration of civil case discovery.

### **Sealing is an Important Case Management Tool at the Adjudicative Stage**

In contrast to protective orders (or nondisclosure) during discovery, sealing during the adjudicative stage of a case is not governed by the Federal Rules of Civil Procedure. The line between the discovery stage and the adjudicative stage is crossed when the parties file documents with the court. Once the adjudicative stage is reached, whether a court record should be sealed is determined by the presiding judge upon request by a party. When a request for sealing is made, the judge weighs the need for confidentiality against the public's interest and right of access to court proceedings and records.

The burden of overcoming the public's right of access to court proceedings and records is placed on the party that seeks to seal them. The burden is a heavy one – only the most compelling reasons justify the non-disclosure of court records. A judge that grants a request to seal court records must set forth specific findings and conclusions that justify nondisclosure to the public—even if there is no objection to the motion to seal. The judge must specifically address: why the interests in support of nondisclosure are compelling; why the interests supporting access are outweighed in that instance; and why the restriction to access itself is no broader than necessary. In other words, even where a party can show a compelling reason why certain documents or portions of documents should be sealed, the seal itself must be narrowly tailored to serve that reason.

Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access.

Even when a document is sealed, courts continue to take the public's right of access into account. The specific requirements of binding case law vary somewhat from one district or

circuit to the next. Based on a review of cases, courts generally look to these following principles when sealing a record (or closing a proceeding):

- 1) Absent authorization by statute or rule, permission to seal may be given by a judicial officer. A clerks' office may not seal a record on its own, and the parties, even if in agreement, cannot create a seal.
- 2) Motions to seal are publicly docketed in a typical case. This provides notice to the public, the media, and interested parties who can intervene and be heard on the matter;
- 3) Courts routinely permit non-parties to intervene for the purpose of challenging the motions;
- 4) There must generally be a public record of courts' decisions to seal. This public record should include what is sealed and why, consistent with the reason for sealing;
- 5) Sealing is to be no more extensive than necessary. Courts are careful to seal only the portions of the record that require sealing;
- 6) The record needs to be complete and accurate in order to facilitate appellate review, including what is sealed and why;
- 7) The record is to be unsealed when the need for sealing expires.

#### **Judges Exercise Their Sealing Authority in a Relatively Small Number of Cases**

I want to emphasize that sealing court filings is the exception, not the rule, in civil litigation. The vast majority of court records are open and readily available to the public. In fact, in most cases, a motion to seal is never filed. And even in those cases where one is filed, it is not always granted. Rather, judges throughout the Federal Judiciary are acutely aware of their responsibility and duty to protect the public's access to all aspects of judicial proceedings—

including access to court records—and approach motions to seal with the public’s interest in mind. And when a motion to seal is filed, judges have a responsibility to scrutinize carefully and dutifully the request and adhere to the appropriate legal standards to reach a decision that the judge believes is justified by the facts and circumstances presented in the case. Bearing these standards in mind, it is judges who should determine how best to manage the sealing practices in their courtrooms. They are uniquely positioned to make such decision based on the facts of that particular case, governing case law, and a district’s local rules and practices.

#### **Non-Parties May Intervene**

Additionally, non-parties may intervene in litigation to argue to a presiding judge for the disclosure or against the sealing of particular documents in a case.

#### **Sealing Constitutes a Key Component of Judges’ Discretionary Authority over Complex Litigation and Discovery Processes**

Today’s environment of voluminous electronic discovery reinforces the need to maintain broad judicial discretion for evaluating and granting motions to seal and protective orders. The current Rules of Civil Procedure regarding protective orders give judges discretion over discovery disputes between the parties, while allowing them to focus on the Judiciary’s primary responsibility of ensuring a fair and impartial adjudicatory process. Considerations surrounding parties’ sealing requests during the adjudicative stage vary, as they must, from one case to the next and maintaining judicial discretion is paramount. Discretionary authority in these areas ensures that judges can weigh parties’ constitutionally-protected rights to privacy and confidentiality with the public’s interests in disclosure and access. A district’s local rules also

lend a degree of consistency in courts' sealing practices and serve as an important check against the possibility of improper standards being applied to a court's sealing analysis.

### **Decisions to Seal are Appealable**

A judge's decision to seal is subject to appeal. Some courts of appeals have determined that they have jurisdiction to hear interlocutory appeals of trial court decisions to seal, to not seal, or to unseal judicial records. Other courts of appeals review district court sealing orders by mandamus. Appellate courts have emphasized that when entering orders that inhibit the flow of information between courts and the public, district courts must articulate, on the record, their reasons for doing so or face reversal of their sealing orders. The strength and thoroughness of the appellate process ensures that there are reviews of and checks on district court orders to seal. Third-party intervention and local rules help ensure that, even before an appeal is filed, courts' sealing decisions are not made in a vacuum.

Ultimately, sealing practices must be flexible enough to allow each individual judge to manage his or her case in a way that adequately reflects the particular facts of the case, to satisfy the requirements of applicable case law, and to comport with standards of local practice. The Federal Judicial Center (FJC), which serves to research ways to improve judicial administration and to educate the federal judicial branch, has already published manuals concerning the sealing of documents – both pursuant to protective orders and at the adjudicative stage. As individual judges, we will always seek opportunities to increase our awareness of the legal and operational issues surrounding public access, and seek to develop and apply best practices on how to approach the restrictions we apply.

**Conclusion**

Thank you for the opportunity to present a few thoughts on this issue. Let me close where I began. The Federal Judiciary – each federal court and every federal judge – takes the public’s interest and rights to access seriously, and actively endeavors in each case to ensure that the public’s interest and rights are protected. The exercise of judicial power requires judges to balance the public’s interest and rights to access against countervailing and compelling interests for protecting information from public disclosure. I am happy to continue that conversation with you and answer questions from the Committee.

Mr. JOHNSON of Georgia. Thank you. We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

Judge Fleissig, both of the Judicial Conference's camera pilots were reviewed favorably by judges who participated, which seems at odds with the strict limitations against cameras that currently exist. Why did the Judicial Conference continue to impose strict limits, particularly on district courts, in the face of such seemingly strong evidence that the presence of cameras was beneficial?

Judge FLEISSIG. Thank you, Chairman Johnson. I am so sorry. Thank you, Chairman, for the opportunity to address this important question. The Judicial Conference has engaged in two multiyear, in-depth studies with respect to cameras in the courtroom, and each time that has happened, the results that have come back have, in fact, been mixed. And while some have had favorable experiences, others have not.

And the Judicial Conference has carefully reviewed those studies, and in balancing all of the information presented, felt that the detriment to allowing cameras in the courtroom outweighed the benefits of it, separate and apart from the cost of technology and resources that it would take to implement such a policy. We feel that on balance, it can be very destructive to the integrity of the trial court process and be detrimental on balance.

Mr. JOHNSON of Georgia. What factors led to that conclusion?

Judge FLEISSIG. Various factors, including the fact that trials, as we know as trial judges, are incredibly stressful events to begin with. Witnesses come from far away. They are not comfortable coming to testify in court. Frequently, very embarrassing information can come forth when a witness is on the bench in cross examination from trial counsel on the other side, and often very confidential matters are discussed as well. And we have certainly seen some notorious trials in our past where cameras did not help in instilling any respect for the court process. And we believe that the litigants' interests are what is paramount.

Mr. JOHNSON of Georgia. Well, let me ask you this question. Is the wealth of data and experience from State courts of relevance to the Judicial Conference's policy on cameras in the courtroom and allowing same-day livestreaming?

Judge FLEISSIG. Absolutely, Chairman, and our understanding is that the experience of State courts has been mixed. And while many State courts do, in fact, allow cameras in the courtroom, many of them very rarely offer any televised accounts of any court proceedings. So while it is possible, those courts could go for long periods of time without any court proceedings actually being televised. So it is a full range of experiences that we see from the courts.

Mr. JOHNSON of Georgia. Thank you. Judge Story, your testimony states that you want to emphasize the sealing court filings is the exception, not the rule, in civil litigation. But it is not just a quantity problem. It is also a quality problem. Reuters reporters here today have documented a troubling amount of information relevant to public health and safety that has been kept under seal. If information of greatest public relevance is kept under seal, it is not counterbalanced by the fact that other potentially mundane as-

pects of a court proceeding are publicly available. Do you agree with me on this point and that, accordingly, courts must be careful even if only a relatively small amount of material is to be sealed?

Judge STORY. Mr. Chairman, I absolutely agree that we have to be extremely careful because what we are talking about is public access, and so a decision to seal matters has to be carefully considered. And you mentioned public health and safety. Those are substantial matters that have to be considered by the judge and weighed against the other interests that are being proposed to counterbalance that. Yes, the answer to your question is, yes, that is an important matter. Will it always carry the day? No, it is a balance, and you have to look at the factors from both sides and make a determination. And that is what I think a judge is uniquely in the place to be able to do.

Mr. JOHNSON of Georgia. Thank you. I will now recognize the gentlelady from Alabama, Ranking Member Roby, for 5 minutes.

Mrs. ROBY. Thank you, Chairman. Judge Fleissig, State governments have access to far fewer resources than the Federal government, yet many State courts have public access systems that are far more user friendly than the PACER system. So what are the courts doing to improve searchability and public access to these documents?

Judge FLEISSIG. Thank you. We do continue. Making PACER as user friendly and effective as it can be is very important to us and something that we continue to work on. We continue to upgrade the user interface systems for PACER. We have proposed recently and approved in the Judicial Conference to increase the exemption level for access to PACER. And we have just begun to form a user group, a user working group, with representatives from the media, academia, the legal profession, and others to help us understand how best to improve our system.

Our system, we exist for the most part to have these filings come into our court, come in with integrity, be available and accessible, and that has occurred, and it has occurred well. And while many State court systems have systems that allow free access, that free access often does not involve the documents themselves. It will involve free access to a docket sheet, and we are endeavoring to make the full scope of information available through our PACER system. We do take it very seriously.

Mrs. ROBY. So all 94 district and 13 appellate courts administer their own case management electronic case filing systems. So what are the cost savings if the courts consolidated the administration of the Case Management/Electronic Filing system?

Judge FLEISSIG. It is difficult for me to imagine any cost savings if they were to be consolidated. As I am sure the Ranking Member knows from our written testimony, we have some examples of situations where other agencies have attempted to do so on courts, and not done so successfully or done so at great cost.

Right now both the statute and the rules provides that each court will maintain its own docket, and while consolidation is something that can be considered, it has to be considered in the context of what will the cost of that be. What level of disruption will it cause? What will be the impact on the speed and integrity of the system if we do that? What cybersecurity risks will be created by



that? If there is an attack on a particular district's system that is handling a very notorious case, is that going to affect the speed and integrity of the filing system across our Nation? These are things that we must consider in considering any notions of consolidation, and I would hope that they would be studied and determined before any steps toward consolidation could be taken.

Mrs. ROBY. Sure, that is all very helpful. Just building off, Judge Story, with what the Chairman was asking as it relates to sealing documents and protective orders. Are there situations in which businesses and individuals would be harmed, either personally or financially, by making public case files? You have touched on this, but I think it would be helpful from your experience on the bench if you could provide maybe some specific examples.

Judge STORY. I think the best example is we are concerned in our country today with protecting intellectual property. In this committee, it is a subject of your concern. And it is troubling to me that in order for an entity that has valuable intellectual property to assert its rights relative to that property and come into the Federal courts that should provide them a forum in order to access that, they are risking releasing that intellectual property. So then there is no need to go out and try to find a way to get to it. Come to the courthouse, and come to the public desk, and open PACER, and there it is.

I think that there are a number of instances. But, again, that doesn't always win either because that is why we need that human factor that weighs it and considers it as a neutral person, but who understands the presumption for public access to the courts. That is the safest way, I think, to assure fairness to everyone.

Mrs. ROBY. Thank you very much. I yield back.

Mr. JOHNSON of Georgia. Thank you. I now recognize the chairman of the full committee, Representative Nadler, for his 5 minutes.

Chairman NADLER. Thank you very much. I want to begin by making clear that my express support for video and audio taping in courtrooms is for appellate courts only. It does not extend to trial courts for reasons of witness intimidation or whatever. Whoever wants to handle it, the Michigan Supreme Court is a court that operates on the presumption that its proceedings should be video recorded. In a letter to the committee, the Chief Justice of that court wrote, "My view in opening the doors of the Federal courts to television coverage is simple. It is the public's court. They should be able to watch it work with as little difficulty as possible." First, Judge Fleissig, then Judge Story. What is your response to the Chief Justice's statement?

Judge FLEISSIG. We do take this very seriously, and the Judicial Conference has permitted each circuit to make its own determination with respect to the audio or video recording of appellate-level oral arguments. And four of the circuits do, in fact, either routinely or periodically allow the video all. Many others allow streaming of their arguments, and all of the appellate courts in our country allow access to audios of their arguments for free, oftentimes same time. And, for instance, in my circuit in the Eighth Circuit, they are available within 2 hours of the oral argument.

And so the audio of those recordings is available across the country, and we believe that it is important for each circuit to make its own determination about how it is going to approach this important subject. And they have each approached it differently, which permits us over time to see how it has worked in each of the circuits in real life.

Chairman NADLER. Judge Story?

Judge STORY. I agree.

Chairman NADLER. Okay.

Judge STORY. I have nothing to add, quite honestly.

Chairman NADLER. Well, thank you. Then let me continue with Judge Fleissig leading on from what you just said. Can you explain why the public's right of access to court proceedings should vary by circuit, which is the Judicial Conference's policy? What factors do the Conference and your committee consider when it decides to let each court of appeals formulate its own cameras and audio policies? Do you have any plans to reevaluate that policy or to adopt a policy encouraging circuit courts to provide livestreaming video and audio? I mean, one would think, I would think, that if it is a good policy in terms of justice and opening the courts, that allowing video and audio access the courts in real time is a good policy period, in this circuit, but not in the circuit. Why should it vary by circuit?

Judge FLEISSIG. Well, we do have a decentralized system in our country, and so each circuit does have the ability to make its own decisions in this regard. Judge Story and I both sit on committees that study these issues and make recommendations to the Conference.

Chairman NADLER. All right. Would you think it a good idea for Congress to say do it across the board in all circuits?

Judge FLEISSIG. I think that this is a matter that should be decided by the courts, and we are moving in that direction. I realize that the pace is of some frustration to certain members of the public and to members of this committee. But as we develop this, policies are able to be developed in this arena so that we can find the right way to approach these issues.

Chairman NADLER. Thank you. I will not take that as a comment on the PACER question. Judge Story, your testimony describes clearly how things ought to work when it comes to law governing motions to seal. What evidence is there to show that things are working the way they should, that judges, in fact, are giving reasons why a materially-given case ought to be sealed?

Judge STORY. The only evidence would be the orders issued by the judge. As to whether it happens in every case, I would not represent to you that it does. The truth of the matter is under the press of business, when a judge in a busy trial court is presented with a consent order from parties resolving a matter, that order may be entered and perhaps not looked at as closely in terms of the effect on access. That can happen. I will be honest with you.

Do we need to step back and realize that that is an issue that has come to the fore? Yes, I believe we do. I think that the courts need it, we don't operate in a vacuum. We realize what is being said. We understand and appreciate the criticisms of the court, and we take those into account. I can say to you I hear you saying this.

I can tell you right now there is a motion pending before me, and I am looking at differently because I have had to think more about it now. And if we move these things to the front burner, they get more attention, and I think this has more attention. And that is as candid with you as I can possibly be. I think that is the case.

Chairman NADLER. Thank you. My time has expired. I yield back.

Mr. JOHNSON of Georgia. Thank you. That is a compliment to the Committee for having this hearing today, and we appreciate that. I will next turn to the gentleman from Virginia, Mr. Cline, for 5 minutes.

Mr. CLINE. Thank you, Mr. Chairman. I thank the judges for coming in today, for their willingness to answer questions as well. We had Members' Day for our own colleagues on the committee last week, and we weren't allowed to ask them questions, so I commend you all for making yourselves available.

This is a very important topic that we have jurisdiction over in the Judiciary Committee, the Federal judiciary. Courts affect our daily lives, and they oversee everything from divorces and criminal cases in State courts to major U.S. Supreme Court decisions that shape our jurisprudence for decades and centuries. The purpose of today's hearing is to discuss the public's right to access court information, whether it be through the PACER system or the standards for sealing documents.

Transparency in government is vitally important as it improves the public's trust in their government, but our efforts to ensure this trust should not be taken lightly, especially in the court system where some of the most private aspects of an individual's life may be discussed. It is a balancing act, as you said, that we are here to discuss today. However, it is concerning to me that despite trends toward more transparency in other sectors of the government, access to our Federal courts is often less so, with the PACER system continuing to charge a per-page fee for access to documents.

As an attorney, I practiced in my home State of Virginia where I believe we have a robust system to access our court files online, constantly improving, but maintaining a system that is free of charge from general district courts to the Supreme Court of Virginia. Access to juvenile and domestic relations courts is limited only for the purposes of payments and select JDR courts. And I am pleased to co-sponsor the ranking member's PACER bill.

While I am in favor of same-day audio, I do have reservations about allowing cameras in the courtroom in real time as there are many issues that must be addressed to ensure the privacy and constitutional rights of those in the courtroom, witnesses and others, but also to ensure that in this of 24-hour news coverage, we don't experience the problems that often plague our own institution here with people playing to the camera. The current policy of audio coverage strikes the right balance.

And that is why this past spring I led a bipartisan letter to the Supreme Court requesting to make available same-day audio for a single case, Department of Commerce, et al., v. New York, et al., regarding redistricting. Although video coverage of Supreme Court hearings has never been allowed, audio files usually are released at the end of the week. Unfortunately, our request was denied.

We have important topics to deal with today, and I look forward to the discussion. I really don't have any questions for the judges, except for one. Judge Fleissig, you mentioned power users. Can you tell me what a power user is? Give me an example.

Judge FLEISSIG. Yes, sir. Thank you for the opportunity to explain this. A small percentage of the users of the PACER system account for an inordinate amount, three percent, accounts for approximately 87 percent of the fees that are generated by PACER. And these are entities that obtain information from the system and then use it as part of their business model. They will repackage it in some fashion and make it available to others who are able to access it through their interface system.

Mr. CLINE. So commercial entities.

Judge FLEISSIG. Yes, sir.

Mr. CLINE. Okay. Thank you. I don't have any other questions, Mr. Chairman. I yield back.

Mr. JOHNSON of Georgia. Okay. Thank you. Can you give us some examples of those commercial interests that monetize the PACER system?

Judge FLEISSIG. For instance, Bloomberg. There are entities that obtain the information from the system, and then they resell it to the legal community and to others. And people are able to access these systems at law schools, in law firms, other places, and there are numerous such individuals. I hate to name them by name here.

Mr. JOHNSON of Georgia. Thank you. I will next turn to the gentleman from California, Mr. Stanton, for 5 minutes.

Mr. STANTON. Mr. Chairman, you just demoted me to California. I proudly represent Arizona here in Congress. That is all right. [Laughter.]

Mr. STANTON. And I want to say good afternoon to Judge Story and Judge Fleissig. Adequate access to our courts is essential to ensure equal justice under the law. That is why this past July I worked for the passage of H.R. 1569, a bill adding the cities of Flagstaff and Yuma to the list of locations in which Federal district court can be held in the State of Arizona. That legislation addressed the physical barrier often presented to rural and tribal communities, including the Hopi and Navajo nations, that need better access to the Federal court system.

As we talk about other accessibility measures to the courts, such as video and audio, tribal communities must be part of that conversation. The complexity between statutes, government policies, and U.S. Supreme Court precedents lead to tribal members appearing in Federal court proceedings at far higher rates than non-Native Americans. Given the higher interactions with our judicial system, it is critical that accessing the courts is a tangible option for them. Yet as my staff was preparing for this hearing, it was hard to find information on tribal communities accessing the courts from a telecommunications perspective. So I would like to start there.

How is the Judicial Conference addressing the lack of infrastructure, both in terms of courtroom proximity and telecommunications, for our tribal communities?

Judge FLEISSIG. Thank you, and I do want to say I was pleased as a member of the CACM Committee to recommend the change in the places where in your State.

Mr. STANTON. Thank you. Thank you.

Judge FLEISSIG. And I have to be honest with you. I don't know that our committee has really focused on tribal communities in particular. I know that we have, for instance, recently developed a new telephone system that makes court information available both in English and in Spanish to try and increase access to the courts. And as a member of the CACM Committee, I think that is a question that bears examination.

Mr. STANTON. That is a fair answer. I really appreciate that. It was mentioned in your testimony that PACER can be used to access court documents. Of course, PACER requires an email account and a payment method. It is another reason why in the other committee I am lucky to serve on, Transportation and Infrastructure, we need to make sure we do more to support broadband access in rural areas and, in particular, in tribal communities so they get access to justice through the PACER system.

One recommendation I might have is that the Judicial Conference reach out to our tribal communities and ask them directly how they can better access our court system moving forward.

Judge FLEISSIG. Thank you.

Mr. STANTON. I would like to shift gears to address an issue about the courts in Arizona and that we are facing an extreme shortage of Federal judges. Arizona is one of the fastest-growing States in the country. There are 22 tribal nations in the State that need to access to the Federal courts, and because of the State's proximity to the border, judges have high numbers of immigration- and border-related cases. We desperately need more judgeships to account for these factors.

There are currently only 13 authorized judgeships in Arizona, one of which is temporary. The temporary judgeship was authorized in 2002, and while the district's total filings have increased more than 85 percent since then, no new judgeships have been authorized since. That is 17 years of growth without any new judges in our State. The lack of judges in Arizona run parallel to the larger conversation about accessing the courts. If there aren't enough judges to efficiently manage caseload, then people's access to justice is inhibited.

As you know, the Judicial Conference does a comprehensive review of caseloads and judgeship numbers for courts across the country, and subsequently recommends how many new judgeships district courts should have. When will the Judicial Conference release their next set of recommendations?

Judge FLEISSIG. Is this the next set of recommendations with respect to judicial positions?

Mr. STANTON. Yeah, where new judges should be located.

Judge FLEISSIG. I am afraid I don't have that information.

Mr. STANTON. That is all right.

Judge FLEISSIG. But we will be happy to get that to you.

Mr. STANTON. The most recent survey for Arizona indicated seven new judgeships were needed. We were only granted four new judgeships, so we will obviously be advocating for that in the next set of recommendations. We do need to close the gap between tribal communities and the judicial system, and we need to ensure Arizona has the adequate number of judges to address the increasing

caseloads that they are handling. Thank you, Mr. Chairman. I yield back.

Mr. JOHNSON of Georgia. And, Judge, you can answer that question.

Mr. STANTON. Oh, please.

Judge FLEISSIG. If I may, the information I have just received—

Mr. STANTON. In real time, all right.

Judge FLEISSIG. In real time, yes, but not electronic, is that the Conference has recommended new judgeships for Arizona. We still wait the introduction of a bill to address our judgeships requests, and every 2 years we do an audit, and it is released in 2019. I hope that assists.

Mr. STANTON. That does. Thank you so much.

Mr. JOHNSON of Georgia. Thank you. And now we will recognize the other gentleman from California—I am sorry—Arizona—  
[Laughter.]

Mr. BIGGS. Thank you.

Mr. JOHNSON of Georgia [continuing]. Mr. Biggs for 5 minutes.

Mr. BIGGS. Thank you, Mr. Chairman, and I will say that when you announced that he was from California, it certainly explained his voting record to me. So thank you, Mr. Stanton.

Mr. STANTON. I will be asking for more time after Mr. Biggs is done.

Mr. BIGGS. I knew you would, my friend. So thank you so much for being here today and appreciate the Chairman holding this hearing. I think it is an important topic. And I had the privilege of trying a few cases myself, literally hundreds of cases. And I want to talk a little bit about the camera in the courtroom and those issues because there is some advocacy from some of my friends who would like to see that. Have either one of you worked with cameras in the courtroom?

Judge STORY. I have as a State judge.

Mr. BIGGS. Mm-hmm. Can you comment on what your perception of how that may have changed non-camera proceedings?

Judge STORY. There were mixed results in all honesty. It depended upon who was in the courtroom at the time.

Mr. BIGGS. Meaning?

Judge STORY. It would affect conduct at times.

Mr. BIGGS. Okay. On the part of the witnesses, attorneys, all of the above?

Judge STORY. All. All. Not jurors because jurors were never shown. They are always protected from being shown.

Mr. BIGGS. Yeah.

Judge STORY. But I think in terms of certainly as to witnesses and at least times as to lawyers.

Mr. BIGGS. Okay. Judge?

Judge FLEISSIG. And if I may, my district, the Eastern District of Missouri, was one of the districts that participated in the most recent pilot. And I would speak to attorneys at my pretrial conferences and encourage them to agree to cameras for their proceedings, and I was unable to get any of the attorneys to have both sides agree to that. They were concerned about it disrupting their trial, their court proceeding.

Mr. BIGGS. Yeah, I would have to say that I kind of lean that way myself. We never had live TV proceedings in any of my trials. And some of the attorneys that were on the other side, never me. Boy, I would never play to the camera, I can tell you that. But I think some of my colleagues on the other side would have been more than happy to play to the camera, so I think that is probably it. In fact, I am going to read something from Chief Justice Roberts on cameras in the courtroom and just get you reaction to that if I could.

"I think that having cameras in the courtroom would impede that process. We think the process works pretty well. I think if there were cameras, that that lawyers would act differently. I think, frankly, some of my colleagues would act differently, and that would affect what we think is a very important and well-functioning part of the decision process. I do not think that there are a lot of public institutions, frankly, that have been improved by how they do business by camera."

Senator Howard Baker told me at one point that he thought that televising of the Senate proceedings, he used a strong word. I am sure it is not right, whether it is ruined, but it certainly hurt the proceedings. And, you know, Judge Story, since you actually had that experience, do you think that cameras actually ruin the proceedings? And if not, because you said that you had mixed results. How it might have improved the proceedings and what you?

Judge STORY. And I unfairly left out one other person that maybe was affected by the cameras in the courtroom, and it was the judge. And it was because the case, it was one of the first cases with cameras in my State, and it was a death penalty case. The victim was a child. The defendant was a former deputy sheriff. And so there was tremendous public interest, and the cameras ran the entire trial, and they never were turned off.

And I was conscious of those cameras because of my concerns that I would have facial expression that would be inappropriately being displayed on the news that night as there was discussion about some horrific event that had occurred and was in the evidence, and I would appear to be smiling as they were talking about that. And I was conscious of it was another factor for me in how I conducted myself in the trial.

Mr. BIGGS. Well, so we have talked now about cameras in jury trials, but we haven't really talked about in appellate proceedings. And I think Chief Justice Roberts largely probably about appellate proceedings because he doesn't like it, is my understanding. What are your thoughts on cameras in appellate proceedings? Judge Fleissig.

Judge FLEISSIG. I am not sure I know exactly how much is to be gained from having a video camera capture a person standing at a lectern speaking to the judges and having the three judges respond. And, in fact, when I have watched some of these, I found it distracting to even listen to it because you end up focusing on a judge who may be thumbing through the brief. I find that the audio is far more effective for me when I am trying to capture what happened in an appellate argument.

And I am not sure how much more is to be gained when exhibits are not being offered, witnesses are not there. The video is of two

lawyers standing at a lectern and three judges who are periodically asking questions. I realize we live in a TV age, but I am not sure how much more is gained.

Mr. BIGGS. My time has expired, but it is not unlike CSPAN showing Congress, I guess. Thank you, Mr. Chairman.

Mr. JOHNSON of Georgia. Thank you. The gentleman from Pennsylvania, Mr. Reschenthaler, has arrived. Sir, I will recognize you for 5 minutes, questions.

Mr. RESCHENTHALER. Thank you, Mr. Chairman. I am good. I appreciate it. I yield the remainder of my time. Thank you.

Mr. JOHNSON of Georgia. Thank you. And with that, that ends the questioning for this panel. We will reconvene to hear testimony of our second panel after a 5-minute recess. Thank you all for coming.

[Recess.]

Mr. JOHNSON of Georgia. I will now introduce our second panel of witnesses. Lisa Girion is a reporter in Reuters' Los Angeles Bureau and previously served as top news editor at the Bureau. Much of Ms. Girion's reporting has been based on internal records produced in court proceedings, sometimes under seal. Before joining Reuters, Ms. Girion was a 16-year veteran and investigative reporter at the Los Angeles Times, where she produced stories on the intersection of government, commerce, health, and welfare. Ms. Girion also served as City Editor and Reporter for the Los Angeles Daily News and held previous reporting roles at the Dallas Times Herald, the Dallas Morning News, and the Wilmington News Journal. Ms. Girion received her undergraduate degree from Northwestern University's McGill School of Journalism. Welcome.

Mr. Daniel Levine has been reporting on the U.S. Judicial system for 15 years, the last 9 of them at Reuters. His stories cover a range of high-profile legal issues across a range of issues. Before joining Reuters, Mr. Levine reported on legal issues for ALM Media, where he covered the Department of Justice and Federal courts. Mr. Levine received his bachelor's degree from McGill University. Welcome today, sir.

Jodi Schebel is Co-Managing Partner at Bowman and Brooke LLP. She focuses her practice on product liability, premises liability, and personal injury defense litigation, and manages all facets of high-exposure litigation from case inception to trial. Ms. Schebel also serves as National Discovery Counsel for a major automotive manufacturer on class action and other product liability matters in both State and Federal courts. Since 2013, Ms. Schebel has served as pro bono counsel for Focus: HOPE, which is a nonprofit organization. Ms. Schebel received degrees from Wayne State University and Wayne State University Law School. I hope that I pronounced your name correctly.

Ms. SCHEBEL. It is Schebel.

Mr. JOHNSON of Georgia. Schebel. All right, thank you. Please accept my apologies.

Ms. SCHEBEL. My husband will be happy it is pronounced correctly.

Mr. JOHNSON of Georgia. Thank you. Seamus Hughes is the Deputy Director of the Program on Extremism at George Washington University, and is an expert on terrorism, home-grown violent ex-



tremism, and countering violent extremism. Mr. Hughes previously worked at the National Counterterrorism Center, serving as a lead staffer on U.S. government efforts to implement a security strategy, and for the Senate Homeland Security and Governmental Affairs Committee, serving as the senior counterterrorism adviser. Mr. Hughes is a graduate of the University of Maryland, and a recipient of the National Security Council Outstanding Service Award and two national Counterterrorism Center Directors Awards for Outstanding Service. Welcome, sir.

Sunny Hostin is the Emmy-nominated co-host of *The View* and the Emmy-winning Senior Legal Correspondent for ABC News. From 2007 to 2016, Sunny was a host and legal analyst at CNN. Prior to working at CNN, Ms. Hostin filled in as a co-anchor for ABC News World News Now and America This Morning. Originally from the South Bronx, Ms. Hostin began her career as an Appellate Law Clerk at the Maryland Court of Appeals. She then joined private practice and later became a trial attorney for the Department of Justice and an Assistant U.S. attorney for the District of Columbia. During her time as Assistant U.S. attorney, Sunny was awarded the Special Achievement Award by Attorney General Janet Reno for her prosecution of child sexual predators. Ms. Hostin received her undergraduate degree in communications from Binghamton University and her law degree from Notre Dame Law School. Welcome.

Last but not least, Mr. Jeffrey Toobin is a staff writer for *The New Yorker* and Chief Legal Analyst for CNN. He is author of several books, including *The Oath: The Obama White House and the Supreme Court*, and *The Nine: Inside the Secret World of the Supreme Court*. Mr. Toobin previously served as an Assistant U.S. Attorney in Brooklyn and as an associate counsel in the Office of Independent Counsel, Lawrence Walsh. Mr. Toobin earned his bachelor's degree from Harvard College and his law degree from Harvard Law School. Welcome, sir.

We welcome all of our distinguished guests, and we thank you for participating in today's hearing. Before proceeding with testimony, I hereby remind each witness that all of your written and oral statements made to the Subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18 U.S.C. Section 1001, which may result in the imposition of a fine or imprisonment of up to 5 years or both.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light on your table. And when the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

Ms. Girion and Mr. Levine, you may begin. First, Mr. Levine.

**STATEMENTS OF DANIEL R. LEVINE, LEGAL CORRESPONDENT, AND LISA GIRION, REPORTER, TOMSON REUTERS CORPORATION; JODI M. SCHEBEL, CO-MANAGING PARTNER, BOWMAN AND BROOKE, LLP; SEAMUS HUGHES, DEPUTY DIRECTOR OF THE PROGRAM ON EXTREMISM, GEORGE WASHINGTON UNIVERSITY; SUNNY HOSTIN, CO-HOST, THE VIEW; AND JEFFREY TOOBIN, STAFF WRITER, THE NEW YORKER**

**STATEMENT OF DANIEL R. LEVINE AND LISA GIRION**

Mr. LEVINE. Well, good afternoon, and thank you, Chairman Johnson, Ranking Member Roby, for the opportunity to testify about Reuters' investigation of court secrecy, and to present our findings on the judicial supervision of sealed court filings that impact public safety.

The courthouse is one of the great public forums of American government. Controversies litigated there, even those nominally involving two particular parties, often impact thousands, if not millions, of people. U.S. appeals courts have long recognized that documents filed in court are presumed to be public and that transparency is fundamental to ensuring accountability and confidence in the courts. To be sure, there are legitimate reasons for keeping some evidence confidential, like medical records or trade secrets. But the public has an interest in learning about drugs' undisclosed side effects, unsafe car parts, or other dangerous defects.

That is why rules and precedents require judges to weigh requests for confidentiality against the public interest, and if they decide evidence must stay secret, to explain their reason in the record. We have found that is simply not happening much of the time. Our investigation focused on large cases involving allegedly defective products used by millions of people. We reviewed documents files in 115 of the largest product liability multi-district cases litigated over the past 20 years. Those cases consolidated about 250,000 individuals' lawsuits, each involving an injury or death.

We found that indiscriminate secrecy is a systemic problem. Federal judges sealed evidence relevant to public health and safety in about half of the largest product liability cases. And in 85 percent of those cases where Reuters found health and safety information under seal, judges provided no explanation for allowing the secrecy in spite of their duty under the law to do so.

Ms. GIRION. Courthouse transparency is more than a lofty ideal. Secrecy has consequences. We found that hundreds of thousands of people were killed or seriously injured by allegedly defective products after judges in just a handful of cases allowed litigants to keep secret evidence that could have raised alarms about potential danger. The opioid epidemic, of deep concern to several members of this committee, is the most significant example that we have found of the tragic toll of secrecy.

The epidemic has been blamed on greedy drug makers, feckless doctors, and lax regulators, but our investigation found that judges, too, contributed to the depth and duration of the catastrophe. In 2001, just a few years after the pain pill, OxyContin, hit the market, West Virginia became the first State to sue Purdue Pharma,

accusing the drug maker of duping doctors into widely prescribing the narcotic by convincing them it was less addictive than other opioids. West Virginia filed some of the evidence it gathered in court, but the judge allowed that evidence to come in under seal, and he put no explanation in the record.

Because the case settled before trial, the evidence remained hidden, out of sight of regulators, doctors, and patients. Over the next few years as OxyContin sales and opioid-related deaths soared, more than a dozen other State and Federal judges overseeing similar lawsuits against Purdue took the same tact, keeping company records secret. It was not until my L.A. Times colleagues and I reported on the contents of some of those sealed documents in 2016 that doctors would learn that for many patients, OxyContin did not work as promised. The evidence showed that Purdue knew of the shortcomings.

Further evidence that might help explain the opioid epidemic continued to be covered up, even as the prices and the litigation exploded. Our reporting showed that Dan Polster, the Federal judge overseeing ongoing opioid lawsuits, has repeatedly allowed important evidence to be filed under seal, again, without any public explanation. In a stern rebuke earlier this year, the Sixth Circuit Court of Appeals reminded Judge Polster that when evidence is filed in court, secrecy is the exception, not the rule. Every decision to seal, the court said, must be justified by a compelling reason.

We encourage you to read our stories attached to our written testimony. They relate other examples of judges allowing important evidence to remain under seal to the detriment of public health and safety. Thank you for your attention to this issue.

[The statement of Mr. Levine and Ms. Girion follows:]

Testimony of Dan Levine and Lisa Girion, Reuters News

"The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts"

Subcommittee on Courts, Intellectual Property, and the Internet, Committee on the Judiciary, U.S. House of Representatives, September 26, 2019

Thank you, Chairman Johnson and Vice Chair Correa, for the opportunity to testify about Reuters' investigation of court secrecy and to present our findings on the judicial supervision of sealed court filings that impact public safety.

My name is Dan Levine. I have been reporting on the U.S. judicial system for 15 years, the last nine of them at Reuters. My stories cover a range of high profile legal issues including President Trump's travel ban, the death penalty and tech privacy. During this time, it has become more and more challenging to explain the workings of our federal and state courts because of a growing number of confidential settlements, sealed motions and even closed hearings.

And my name is Lisa Girion. I came to Reuters in 2016 after 16 years at the Los Angeles Times. Much of my reporting has focused on the tragic consequences of dangerous products and anti-consumer practices. Among the topics of my stories: how health insurers dumped the sick, what J&J knew about what was in its Baby Powder and how the opioid industry duped doctors and patients. All of these stories, and more, relied on records produced in court proceedings but nevertheless kept under seal. The public interest in such evidence is demonstrated by the stories' impact. Each has prompted new legislation, government investigations or changes in corporate behavior.

The courthouse is one of the great public forums of American government. Controversies litigated there, even those nominally involving two particular parties, often impact thousands if not millions of people. That makes the courthouse an indispensable source of information for consumers, journalists, academics, investors and others. U.S. case law recognizes that transparency and open access to proceedings are fundamental to ensuring confidence in the courts and judicial accountability.

As journalists who have long covered and relied on the courts as a source of information, we often encountered court records that appeared to contain information vital to the public interest that were sealed without explanation. To be sure, there are

recognized legitimate reasons for keeping some evidence confidential: private medical records, for instance, or a trade secret like the recipe for Coca-Cola. But the public has an interest, too -- in learning about undisclosed side effects, parts that make cars unsafe to drive, dangerous minerals lurking in cosmetic powders and other hazards.

U.S. appeals courts have long recognized that documents filed in court are presumed to be public. Court rules and legal precedents require judges to weigh requests for confidentiality against the public's interest. But judges seldom do so, thereby failing to fulfill what the law demands of them.

The goal of the Reuters project that brings us here today, "Hidden Injustice," was to answer some basic questions: Is indiscriminate sealing of documents an issue in a few isolated cases? Or, is it a systemic problem throughout the courts? If it is systemic, what are the causes? And, is the public harmed by it?

We were not the first to consider these questions. But in reviewing the historical debate, we realized that no consensus had developed on the answer. Why? No one had done a quantitative analysis to develop reliable national data on the scope of secrecy in the courts.

As Arthur Miller, a recognized authority on civil procedure, put it in a widely cited 1991 Harvard Law Review article: "Is it true that protective orders and court seals keep information regarding public health and safety hidden? Thus far, assertions to that effect have been supported primarily by anecdotal evidence; research or statistical data is completely nonexistent."

So, in the summer of 2017, Reuters began to investigate how common sealed filings were in federal civil litigation.

We analyzed Westlaw data from 3.2 million civil suits filed in federal court between 2006 and 2016. Reporters used a combination of artificial intelligence tools and manual case review. The computer-driven analysis, using a process known as machine learning, reviewed 90 million court actions and identified those in which material was filed under seal. This revealed that judges allowed litigants to seal material in at least 65 percent of product liability cases, all of which involve injury or death.

But to determine whether judges were fulfilling their legal duty to weigh requests for secrecy against the public's right to know, we needed more information about those cases: What was the nature of the material that was sealed? Was it trade secrets or

other information that the law allows to be kept confidential, or did there appear to be information relevant to public health and safety? Did the judges fulfill their legal duty of balancing the public interest against the request for confidentiality?

To answer those questions, we focused on a subset of data: Multidistrict litigation involving product liability claims. The heat of the debate over sealed records is the impact on public health and safety, and those MDLs usually involve widely-used products that are allegedly defective.

We and two fellow reporters spent several months manually reviewing the docket entries in 115 of the largest product liability MDLs that had been litigated over the past 20 years. These MDLs encompassed nearly 250,000 cases -- all consolidated for pretrial proceedings before judges who are typically experienced and well-respected.

We determined the nature of the sealed material by reading unredacted passages or other public court documents that described the content. We flagged instances where it was clear that information related to public health and safety was filed under seal and recorded whether judges offered any justification for the secrecy.

Our findings support what Chairman Johnson told us earlier this month: that secrecy in court is a "life and death" issue.

We found that over the past 20 years, federal judges sealed evidence relevant to public health and safety in about half of the largest product liability cases. Those cases comprised nearly a quarter million death and injury claims involving dozens of products used by millions of consumers: drugs, cars, medical devices and other products.

Secrecy has become so ingrained in the system that judges rarely question it. In 85 percent of the cases where Reuters found health and safety information under seal, judges provided no explanation for allowing the secrecy.

Our reporting found that secrecy has become the norm because it makes things easier for everyone involved. Corporate lawyers want to protect their clients' reputations. Plaintiffs' lawyers want to avoid miring their clients' cases in lengthy courtroom wrangling over requests that filings be unsealed or unredacted. And judges want to keep the business of justice moving on crowded dockets.

The impact of this pro forma secrecy is broad. And deadly. Although secrecy makes complete analysis impossible, Reuters found that hundreds of thousands of people were killed or seriously injured by allegedly defective products after judges in just a

handful of cases -- including opioids -- allowed litigants to file under seal, beyond public view, evidence that could have alerted consumers and regulators to potential danger.

The opioid epidemic is the most significant example we found of the lethal results of this secrecy. The epidemic has been blamed on greedy drug makers, feckless doctors and lax regulators. But judges' contribution to the depth and duration of the catastrophe had gone largely unnoticed.

In 2001, West Virginia was the first state to sue Purdue Pharma over its marketing practices for OxyContin. The state accused the drugmaker of duping doctors into widely prescribing the narcotic by minimizing its risks, convincing them it was less addictive than other opioids because just one dose delivered steady relief for 12 hours.

Although the case was in state court, its path typified current federal court procedure. The parties exchanged evidence during discovery, outside the court record and inaccessible to the public. This exchange occurred, as it almost always does, under the judge's protective order that the material remain confidential.

Then Purdue asked the judge to rule in its favor before trial. That's when documents describing Purdue's marketing strategies began to hit the docket. Evidence entered into the court record to support pre-trial arguments is generally the only way, short of a trial, that discovery material can become public. But in this case, as is routine, the judge allowed that evidence to remain sealed without any explanation.

And because -- as is routine -- the case settled before it went to trial, that evidence remained hidden, out of sight to regulators, doctors and patients. Over the next few years, as OxyContin sales and opioid-related deaths climbed, more than a dozen other state and federal judges overseeing similar lawsuits against Purdue took the same tack, keeping the company's records secret.

It wasn't until my colleagues and I reported on the contents of some of those sealed documents in 2016 at the LA Times that doctors would learn that Purdue's drug didn't work as promised in many patients. And it wasn't until after our stories were published that the West Virginia judge would decide to unseal the evidence -- nearly 12 years after the fact.

Yet the practice of sealing evidence without any public justification continued into the MDL currently proceeding before Cleveland federal judge Dan Polster who, despite existing 6th Circuit case law, allowed sealing and redaction in court filings without any analysis as to whether the material deserved to be secret. Only after the 6th Circuit

specifically rebuked Polster in June did he allow much more information to become public from that proceeding.

We saw the same pattern of secrecy in litigation against Remington Arms Co. Beginning in the early 1980s, judge after judge kept under seal evidence that the trigger on Remington's 700 hunting rifle was prone to misfiring. In 2014, after decades of secrecy, a judge presiding over a class-action lawsuit in Missouri refused to seal a trove of documents that showed the company had been aware of the defective trigger since the late 1940s. By the time the information came out, nearly 200 people had died from accidental shootings blamed on the problem. The company then recalled the defective rifles.

Thousands more people died in rollover accidents involving General Motors Co cars and trucks while judges agreed to hide records showing the company knew that reinforcing vehicle roofs would save lives. After a decade of lawsuits in which those records were kept secret, a Los Angeles judge released the information in 2004 at the request of plaintiffs who wanted to share it with regulators. In 2009, the federal government upgraded a decades-old standard on roof strength.

And as we reported earlier this month, a federal judge in Brooklyn has sealed -- again, without explanation -- evidence that plaintiff lawyers say shows that Merck exaggerated the safety record of its baldness drug Propecia. Citing internal company communications, plaintiffs allege that Merck's label understates the number of men who experienced sexual symptoms in clinical trials and how long those symptoms lasted.

Serious sexual and mental health impacts have been reported among Propecia users. From 2009 to 2018, the FDA received about 5,000 reports of sexual side effects or mental health side effects -- and in many cases, both -- occurring in men who took Propecia. Of those, about 350 reported suicidal thoughts, and about 50 said a patient committed suicide.

Reuters learned about the nature of the sealed evidence only after discovering filing errors in briefs that left some of it exposed. Earlier this month, we filed a motion to unseal those documents, which is pending.

Though undoubtedly plaintiffs sue companies in search of monetary compensation for deaths and injury, many of them also see their lawsuits as an important vehicle for public accountability. They quickly become disillusioned by the secrecy that pervades the judicial process. Plaintiff lawyers told us they are reluctant to fight defendants'



requests for confidentiality because the argument would prolong the case, costing their clients more in legal fees.

The pro forma secrecy prompts some people of conscience to take unorthodox and even legally questionable actions to do what they feel is right by leaking confidential material to journalists.

David Egilman was an expert witness in a lawsuit alleging Eli Lilly & Co's antipsychotic drug Zyprexa could cause excessive weight gain and diabetes. Egilman, a clinical professor of family medicine at Brown University, made Lilly records he had reviewed in the case available to the New York Times.

After the newspaper published articles based on the documents, Lilly threatened to seek criminal sanctions against Egilman. In 2007, he agreed to pay the drug maker \$100,000 to resolve the matter. About a year later, Lilly pleaded guilty and agreed to pay \$1.4 billion to resolve charges it had illegally marketed Zyprexa.

That experience weighed on Egilman when, as an expert witness in the opioid litigation, he tried to persuade a Massachusetts judge to allow documents he had reviewed about Purdue's development and marketing of OxyContin to become public under open records regulations. But, fearing he would set a bad precedent, he dropped the case after the judge expressed skepticism.

"I could have stopped this," Egilman told us in an interview for our June 25 story about sealed evidence in the opioid litigation. "I am morally and ethically responsible. I took an oath to protect my patients' health, not corporate profits."

For more details on our findings and methodology, we refer you to our stories from June 25 and September 11, which we attached to our written statement, along with a description of our methodology.



## HIDDEN INJUSTICE



STANDARD PRACTICE: West Virginia Judge Booker T. Stephens, like many judges after him, allowed evidence about Purdue's aggressive marketing of its blockbuster opioid OxyContin to remain under seal. REUTERS/Benjamin Lesser

## How judges added to the grim toll of opioids

JUNE 25, 2019

For years, they sealed evidence about the risks as the body count mounted. And as a Reuters analysis found, it's only one of many big product-liability cases in which judges have countenanced a lethal and often unlawful secrecy.

By BENJAMIN LESSER, DAN LEVINE, LISA GIRION and JAIMI DOWDELL

WELCH, West Virginia – The opioid epidemic that has so far killed half a million Americans is routinely blamed on greedy drug makers, feckless doctors and lax regulators. But there's another group that has contributed to the depth and duration of the catastrophe: judges.

Judges like Booker T. Stephens.

Until his retirement in May, Stephens sat on the West Virginia Circuit Court in Welch, deep in Appalachian coal country, where addiction took early root among miners who were prescribed the blockbuster opioid OxyContin for the pain their jobs inflicted. And it was in his court where the first lawsuit filed by a state against OxyContin's maker, Purdue Pharma LP, landed in 2001.

West Virginia accused Purdue of duping doctors into widely prescribing the drug by minimizing its risks, convincing them it was less addictive than other opioids because just one dose delivered steady relief for 12 hours. In the pretrial "discovery" phase of the case, Purdue sent thousands of pages of internal memos, notes from sales calls on doctors, marketing plans and other records to the state's lawyers who had requested them.

That evidence was clearly compelling: In a 2004 ruling, Judge Stephens rejected Purdue's motion that he dismiss the case and sided with the state's assertion that the material could convince a jury that Purdue's sales pitch was full of dangerous lies.

But Stephens sealed the evidence on which he relied in that ruling. And when Purdue and the state reached a settlement that year, before the case went to trial, the evidence remained hidden, out of sight to regulators, doctors and patients. Over the next few years, as OxyContin sales and opioid-related deaths climbed, more than a dozen other judges overseeing similar lawsuits against Purdue took the same tack, keeping the company's records secret.

It would be 12 years – and 245,000 overdose deaths – before evidence Stephens and other judges kept hidden was made public, and then only after it was leaked to a newspaper. What it showed was revelatory: OxyContin, the first billion-dollar-a-year narcotic, was not the reliable 12-hour painkiller Purdue long claimed it was. Its effects often wore off much sooner, exposing patients to a relapse of pain, withdrawal, or both – suffering relieved only by the next pill. When doctors raised concerns, the documents showed, Purdue sales reps counseled them to put patients on bigger, more dangerous doses.

The eventual release of the evidence reinforced the widely held view that OxyContin was a catalyst for the epidemic, which by then had expanded beyond prescription opioids to include illicit drugs such as heroin. The material also informed hundreds of new lawsuits seeking to force accountability on the entire opioid industry for its role in the addiction crisis.

But for untold numbers of opioid users who had overdosed, it was too late. "Heartbreaking and sickening" is how Congresswoman Katherine Clark, a Massachusetts Democrat who has been involved in investigating the causes of the opioid epidemic, described the early decisions to seal the Purdue evidence. In an interview, Clark said she believes that had the secrets come out earlier, doctors would have written fewer OxyContin

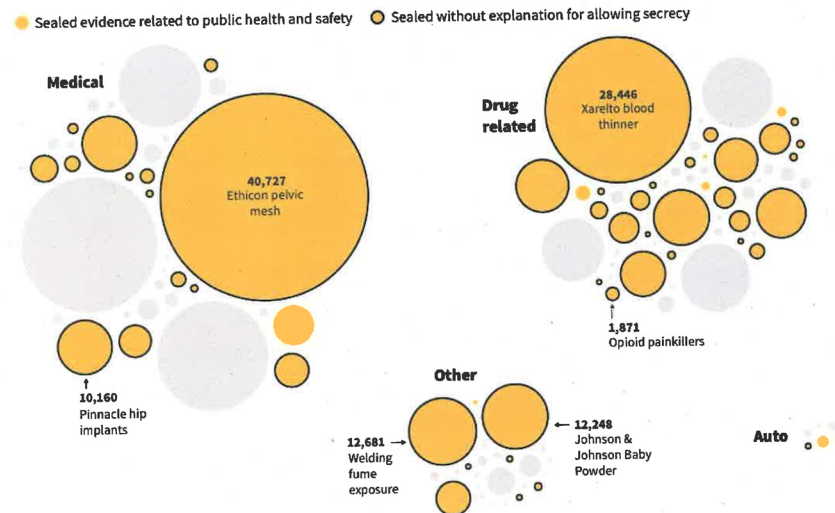
prescriptions and fewer insurers would have covered the drug. “We don’t know how many lives we could have saved,” she said.

Stephens told Reuters he doesn’t second-guess his decision. “It happened, and that’s all that I can say about it,” he said. “It speaks for itself.”

Today, 15 years after Stephens protected Purdue’s secrets, Federal Judge Dan Polster is providing the same cover for multiple opioid makers, distributors and retailers. He is presiding over a mass of litigation that seeks to hold the entire industry responsible for the epidemic. Life-saving information contained in those cases, too, may remain under seal, as Polster has stuck to a strict secrecy playbook.

### Under wraps

Judges sealed evidence related to public health and safety in about half of the 115 biggest defective-product cases consolidated before federal judges over the past 20 years. In 85 percent of those cases, judges did not explain their reasons for allowing secrecy, though they are required to do so. Consolidated cases are scaled by total actions.



Sources: The Judicial Panel on Multidistrict Litigation and a Reuters review of federal court records maintained by Westlaw.

Polster declined to comment for this article.

The trail of hidden evidence running through the opioid crisis is emblematic of a pervasive and deadly secrecy that shrouds product-liability cases in U.S. courts, enabled by judges who routinely allow the makers of those products to keep information pertinent to public health and safety under wraps. And since nearly all such cases are resolved before trial, the evidence often remains secret indefinitely, robbing consumers of the chance to make informed choices and regulators of opportunities to improve safety.

In an unprecedented analysis, Reuters found that over the past 20 years, judges sealed evidence relevant to public health and safety in about half of the 115 biggest defective-product cases consolidated before federal judges in so-called multidistrict litigation, or MDLs. Those cases comprised nearly 250,000 individual death and injury lawsuits, involving dozens of products used by millions of consumers: drugs, cars, medical devices and other products. And the numbers don't convey the full extent of information locked away because they don't include thousands of product-liability cases heard in state courts.

The impact is broad. Although secrecy makes complete analysis impossible, Reuters found that hundreds of thousands of people were killed or seriously injured by allegedly defective products after judges in just a handful of cases allowed litigants to file under seal, beyond public view, evidence that could have alerted consumers and regulators to potential danger.

For example, beginning in the early 1980s, judge after judge kept under seal evidence that the trigger on Remington Arms Co's Remington 700 hunting rifle was prone to misfiring. In 2014, after decades of secrecy, a judge presiding over a class-action lawsuit in Missouri refused to seal the trove of documents, which showed that the company had been aware of the defective trigger since the late 1940s. By then, nearly 200 people had died from accidental shootings blamed on the problem. The company then recalled the defective rifles.

Thousands more people died in rollover accidents involving General Motors Co cars and trucks while judges agreed to hide records showing the company knew that reinforcing vehicle roofs would save lives. After a decade of lawsuits in which those records were kept secret, a Los Angeles judge released the information in 2004 at the request of plaintiffs who wanted to share it with regulators. In 2009, the federal government upgraded a decades-old standard on roof strength.

Remington declined to comment. In a statement emailed to Reuters, GM said: "Advances in auto safety effectively addressed this concern many years ago ... Also, it's fair for individuals or companies to be able to request that certain sensitive or personal information be safeguarded."

## THE LAW AND THE REALITY

In fact, court records are presumed to be public as a matter of law. They can only be sealed for valid concerns about privacy, including personal medical records, and to protect company trade secrets.

In most states and nearly all the 13 federal appellate circuits, judges are legally obliged to weigh any litigant's request that information be sealed against the broader public interest in making it public. They also must explain in the court record any decision in favor of secrecy. Judges incur no penalty for failing to do these things.

In practice, secrecy has become so ingrained in the system that judges rarely question it. In 85 percent of the cases where Reuters found health and safety information under seal, judges provided no explanation for allowing the secrecy.

Judge Stephens was bound by West Virginia law to weigh secrecy against transparency and provide in the court record his reasoning. Like many judges in his position, he did neither. "This case was sealed because both sides agreed and asked me to seal it," he told Reuters.

That reasoning explains why secrecy has become the norm: It makes things easier for everyone involved. Corporate lawyers want to protect their clients' reputations. Plaintiffs' lawyers want to avoid miring their clients' cases in lengthy courtroom wrangling over requests that filings be sealed or redacted. And judges want to keep the business of justice moving.

Secrecy is amplified by the growing practice of consolidating similar lawsuits under a single judge. MDLs, which now cover as much as 40 percent of all lawsuits filed in federal courts, are meant to promote efficient resolutions. Each decision the judge makes applies to all of the consolidated lawsuits. Thus, with one sealing order, a judge can impose secrecy in thousands of cases.

That is now happening in federal district court in Ohio, where Judge Polster is managing nearly 2,000 lawsuits filed against the opioid industry. Cities and counties across the country claim that companies up and down the supply chain – drug makers like Johnson & Johnson's Janssen Pharmaceuticals subsidiary and Teva Pharmaceutical Industries Ltd, as well as Purdue, distributors like McKesson Corp, and retailers like Walgreens Co – contributed to the public-health disaster by using misleading marketing and other ruses to boost sales at the expense of public safety.

So far, Polster has imposed a draconian secrecy on the proceedings. The judge, a former federal prosecutor confirmed to the bench in 1998, has given the litigants broad discretion to determine what records remain secret. As a result, entire lawsuits have been filed under seal in his court, including supporting evidence drawn from millions of records that detail the industry's conduct over two decades.

All the companies have denied the allegations. Teva and McKesson declined to comment for this article. Walgreens did not respond to a request for comment. Janssen said its marketing of opioids was "appropriate and responsible."

Privately held Purdue, controlled by the Sackler family, said that OxyContin "has been deemed safe and effective for 12-hour dosing," that it has always given the U.S. Food and Drug Administration (FDA) all information the agency requires, that protective orders are routine, and that any suggestion the company

used court-ordered secrecy to withhold relevant safety information about OxyContin is misleading and inflammatory. Purdue said it has spent more than \$1.5 billion on efforts to solve the opioid crisis. “These efforts, not the disclosure of Purdue’s internal documents, will help solve the complex opioid abuse crisis,” it said.

A few states, including Texas and Florida, have adopted “sunshine” rules and laws that limit the sealing of health and safety records. At the federal level, corporate lobbying has stymied sunshine legislation for decades.

Opponents of sunshine laws often cite a 1991 Harvard Law Review article in which New York University law professor Arthur Miller wrote that no hard evidence showed that court secrecy caused any harm to public health or safety. “Research or statistical data is completely nonexistent,” Miller wrote.

In an interview, Miller said Reuters’ analysis of court data helps fill that void and suggests that judges are not fulfilling their responsibility to guard the public interest. “Certainly, anything relating to public health or things tied to social policy, you would want to have an explanation as to why something is sealed,” he said.

### “THAT’S BANANAS”

In the years following the Purdue case, Judge Stephens watched the wreckage of opioid addiction flow through McDowell County Circuit Court: burglaries, robberies, assaults. Thursdays in the hilltop courthouse in Welch were usually spent dealing with parents accused of child abuse and neglect.

On one rainy Thursday last February, a clerk led a steady stream of mothers and fathers into Stephens’s chambers, where he decided whether their children could remain with them. “In almost every case, the parents are addicted,” Stephens said later. “We have parents who are now choosing drugs over their own children.”

When the state’s suit against Purdue came before him in 2001, the cumulative U.S. death toll from opioids since 1999 was 16,000, according to the National Institute on Drug Abuse. Stephens, who served for more than three decades on the McDowell County court before his May retirement, still counts it as his most high-profile case.

During the discovery process, each side was obliged to send information requested by the other – including the Purdue documents describing the company’s development and marketing of OxyContin. That exchange is where secrecy gets its start in lawsuits.

For decades, the rules of civil litigation required that evidence collected during discovery be logged with the court, open to public scrutiny. Secrecy was the exception.

In the 1980s and 1990s, rule changes moved discovery out of the courthouse and thus out of public view. Instead, the material was to be swapped privately between the lawyers involved. Companies eager to keep

their records confidential had pushed for the change, but it also served the interests of judges and court clerks inundated with increasingly complex product-liability cases and huge caches of documents accompanying them.

In the early 2000s, under the new discovery rules, Purdue's lawyers sent the company's documents directly to lawyers working for West Virginia, outside the court record and thus inaccessible to the public. This exchange occurred, as it almost always does, under the judge's protective order that the material remain confidential.

**"He's not allowed to do that without providing reasons."**

Professor Jennifer Oliva, West Virginia University College of Law, on Judge Stephens's decision to allow evidence in West Virginia's lawsuit against Purdue to be sealed

Lawyers for Purdue filed a pretrial motion asking Judge Stephens to dismiss the case. West Virginia, to support its argument that the case should go to trial, submitted as evidence some of the documents Purdue had handed over in discovery.

Such evidence entered into the court record to support a pretrial motion is generally the only way, short of a trial, that discovery material is made public – though that evidence often represents only a tiny fraction of what's produced in discovery. Here, too, secrecy prevailed. Lawyers for Purdue and the state agreed between themselves that the state would file its motion and supporting evidence under seal. Stephens did not evaluate the material to determine whether secrecy was warranted, as required by state law, and he provided no rationale.

"That's bananas," said Jennifer Oliva, a professor at West Virginia University College of Law. "He's not allowed to do that without providing reasons."

Judge Stephens was no rogue outlier. At least 16 other judges allowed internal documents produced by Purdue in lawsuits filed between 2001 and 2007 to be sealed without explanation. Court records make clear that evidence under seal pertained to Purdue's marketing.

More broadly, in at least 31 of the 115 large federal product-liability cases Reuters reviewed, judges sealed entire arguments that dealt directly with the strength of the evidence. Court rules frown on such broad sealing practices because truly confidential information rarely spans an entire legal brief. In most of those cases, nothing in the court record indicates that the judge conducted any analysis of whether secrecy was merited.

Almost immediately after Stephens's 2004 ruling that the evidence against Purdue was sufficient for the case to proceed to trial, Purdue settled with West Virginia for \$10 million. Stephens left his sealing order intact. The evidence was locked away in a vault in McDowell County Courthouse. By the end of that year,



opioid deaths neared 65,000.

Stephens told Reuters that he was simply honoring the litigants' wishes. "Obviously when you settle a case of this magnitude and of this nature, Purdue Pharma would not want to let the world know they had engaged in deceptive marketing practices," he said.

Frances Hughes, West Virginia's chief deputy attorney general at the time, said the state agreed to Purdue's sealing requests to get the evidence it needed and avoid a potentially lengthy court fight. "We were doing something that is very much routine and necessary when you are involved in litigation with a major corporation," she said.

Many plaintiffs' lawyers privy to evidence that could affect public health and safety told Reuters they had often employed a similar calculus. Bound by ethics rules to put their clients' interests first, they want access to records that can help their cases. Demanding transparency can cause protracted delays.

Judges, while charged with guarding the public interest, also have large caseloads. At the federal level, their efficiency in handling those caseloads is measured by the Administrative Office of the U.S. Courts, the federal judiciary's management agency, but judges aren't formally penalized for letting cases drag on.

Many judges want to avoid getting bogged down in confidentiality battles, said Jeremy Fogel, who as a judge until last year managed the Federal Judicial Center in Washington, D.C., an agency that helps educate judges.

"You're overburdened. You've got limited bandwidth. You have lawyers fighting about everything. And so, when they finally agree on something, you're all too happy to accept that," said Fogel, now head of the Berkeley Judicial Institute at the University of California.

As a result, he said, "information that could have really made a difference sometimes doesn't come to light."

## LITTLE DATA, LITTLE SUNSHINE

In the years following Stephens's ruling, Purdue benefited from the secrecy that had shrouded the West Virginia and similar cases.

The U.S. Department of Justice in 2007 brought criminal charges against Purdue, accusing it of lying in its marketing about how easy it was to abuse OxyContin by crushing the pills to get their full narcotic payload all at once.

In a filing in federal court in Abingdon, Virginia, Purdue reasserted its 12-hour claim: "When taken as directed, without tampering with the product's controlled-release delivery system, OxyContin is indisputably safe and effective."

Under a plea bargain, three Purdue executives admitted guilt but served no time. The company paid \$600 million to resolve the case. The three executives later left the company.

Company records that dribbled out over the years generated newspaper and government reports about

aggressive sales tactics. But evidence undermining Purdue's claims about OxyContin remained locked away in courthouses across the country. And Purdue continued marketing its drug based on the contested 12-hour claim.

OxyContin sales surged, topping \$2 billion in 2008. Opioid deaths climbed to 135,000 by the end of 2008. The next year, Purdue's 80-milligram Oxycontin pill, the largest-dose version, was the company's biggest moneymaker. That year, drugs – fueled by the spike in opioid overdoses – surpassed car accidents as a cause of death in the United States.

By then, Mississippi lawyer Philip Thomas was trying to bring information about Purdue's marketing of OxyContin to the attention of regulators. Thomas represented Patricia Gwen Kiser, a nurse who alleged in a lawsuit against Purdue that her doctor had prescribed OxyContin for her fibromyalgia and arthritis pain based on the company's false claims about the drug's safety.

Purdue turned over more than 250 boxes of records to Thomas, designating most of the evidence confidential. Thomas asked Purdue to share just 21 of the documents – emails, meeting minutes and the script Purdue asked sales reps to use when pitching OxyContin to doctors – with the FDA. Purdue declined.

Thomas then asked Judge Linda Anderson, the judge hearing the case in federal court in Mississippi, to allow him to share the records with the regulator. Purdue resisted, arguing that the records were confidential trade secrets. Anderson, in a 2010 order, agreed with Purdue.

Anderson did not respond to a request for comment. In its statement to Reuters, Purdue said it provided "all or most" of the documents to the agency, though they "do not contain the type of scientific information" the agency usually relies on.

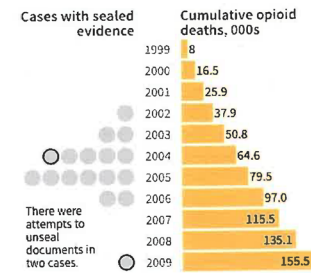
Some regulators have made efforts to counter the potential harm of court secrecy. In 2016, the National Highway Traffic Safety Administration (NHTSA) issued guidance for judges on allowing exemptions in secrecy orders so that lawyers can share health and safety records with the agency. The Consumer Product Safety Commission followed suit.

The FDA has not. In a statement to Reuters, the agency said the current regulatory regime gives it "the tools to keep patients and consumers safe."

The year after NHTSA issued its guidance, the agency opened an investigation into possible safety defects in Goodyear tires on thousands of motor homes. In its December 2017 announcement, the agency said the inquiry, which is continuing, was made possible, in part, only after an Arizona judge allowed the release of the

## Tragic toll

Opioid-related deaths rose steadily as judge after judge left information about Purdue's conduct under seal.



Sources: The National Institute on Drug Abuse and a Reuters review of court records.

tire maker's records, including insurance claims and complaints data.

Goodyear declined to comment, as did NHTSA.

In the absence of such exceptions, lawyers or anyone else with knowledge of confidential evidence put themselves at risk if they share that information outside the confines of court.

David Egilman was an expert witness in a lawsuit alleging Eli Lilly & Co's antipsychotic drug Zyprexa could cause excessive weight gain and diabetes. Egilman, a clinical professor of family medicine at Brown University, made Lilly records he had reviewed in the case available to the New York Times.

After the newspaper published articles based on the documents, Lilly threatened to seek criminal sanctions against Egilman. In 2007, he agreed to pay the drug maker \$100,000 to resolve the matter. About a year later, Lilly pleaded guilty and agreed to pay \$1.4 billion to resolve charges it had illegally marketed Zyprexa.

Lilly declined to comment.

Egilman had that earlier experience in mind when he sought to shine a light on OxyContin, which he had prescribed to a few patients in the drug's early days. While reviewing Purdue's records as an expert witness in a lawsuit against the company, Egilman became convinced that doctors were getting the wrong message about OxyContin.

This time, he went to court to try to force Massachusetts Attorney General Martha Coakley to release evidence her office had gathered during an investigation into Purdue's sales practices.

Massachusetts Superior Court Judge Linda Giles took a dim view of his petition, asking Egilman's lawyer during a 2012 hearing, "What's his agenda?" and "You want me to believe he's some noble citizen?"

Sensing the case wasn't going his way, Egilman said, he agreed to withdraw his petition rather than risk establishing an unfavorable precedent with a ruling that evidence collected in a state investigation was confidential.

"I could have stopped this," Egilman said in an interview. "I am morally and ethically responsible. I took an oath to protect my patients' health, not corporate profits."

Coakley and Giles declined to comment.

By the end of 2012, the opioid death toll stood at 223,000.

The evidence that OxyContin wasn't the benign pain reliever its maker said it was remained locked away until 2016. That year, the Los Angeles Times published a report, based on copies of sealed records, detailing how Purdue sold OxyContin as a 12-hour drug, even though the company knew it often didn't last that long.

The report cited the company documents that Stephens and other judges had long kept under seal, revealing that OxyContin wore off early in Purdue test patients and that physicians complained to sales reps about the problem. Gaps in a narcotic's effect can cause bouts of pain, withdrawal and relief known to foster addiction.

The sealed records further showed that despite what Purdue knew, it hired hundreds of sales reps to push OxyContin as a 12-hour drug because insurers would balk at paying top dollar for a pain reliever that was little different from cheaper alternatives.

After the Los Angeles Times report, Judge Stephens began releasing the records he had sealed in 2004 to news organizations that requested them, including Reuters. “I felt that it would be helpful to others who are going to pursue this type of litigation,” he said.

He was right. Many lawsuits against Purdue have cited the newspaper report and the original records.

When the opioid epidemic landed on Judge Polster’s docket in federal district court in Cleveland in late 2017, it had claimed 350,000 lives.

Blame for the public-health disaster was now directed at the entire industry – drug makers, distributors and retailers. The allegations in the hundreds of cases consolidated in Polster’s court remained consistent: The companies hyped opioids for everyday pain relief, downplayed their addictiveness, and then blamed the people who used them for getting hooked.

“What’s happening in our country with the opioid crisis is present and ongoing,” Polster told a courtroom packed with lawyers for a Jan. 9, 2018, hearing. “Since we’re losing more than 50,000 of our citizens every year, about 150 Americans are going to die today, just today, while we’re meeting.”

The judge said then, as he has said many times since, that he wanted the suits settled quickly so that communities ravaged by addiction can receive money to combat the crisis. “I don’t think anyone in the country is interested in a whole lot of finger-pointing,” Polster told the standing-room-only crowd. “People aren’t interested in depositions, and discovery, and trials.”

The tobacco industry settlement of 20 years ago, however, shows that when evidence is aired, it can have a big public impact. Under their landmark agreement with 46 states in 1998, cigarette makers paid \$246 billion and divulged more than 26 million pages of records showing how they had manipulated nicotine to foster addiction and funded research to sway policy. That information formed the basis of public-health initiatives and regulatory action in 160 countries. Since then, smoking rates in the U.S. have plunged to historic lows.

Citing the tobacco archives, public interest lawyers recently filed a brief in Polster’s court asking that any resolution of the opioid litigation require the disclosure of all documents to promote research, changes in public policy, regulations and consumption.

In Polster’s court, as lawyers began fleshing out their cases against the opioid industry in amended complaints, they redacted details of the companies’ conduct. In almost every instance, Polster failed to provide on the record his reason for allowing the secrecy, though the U.S. Court of Appeals for the Sixth Circuit, which oversees his jurisdiction, has established precedent requiring that he do so.

A few courts, recognizing the breadth of the opioid crisis, have recently signaled a less tolerant stance on secrecy, putting them at odds with Polster.

Massachusetts Superior Court Judge Janet Sanders was presiding over a hearing in January on Purdue's request to maintain hundreds of redactions in a lawsuit filed against it by the state. News organizations, including Reuters, had petitioned Sanders to lift the redactions.

Sanders reminded the lawyers that they were in the courthouse where records of child sexual abuse by Roman Catholic priests had been sealed – until the Boston Globe petitioned the court for their release.

That case, she said, showed that even if the litigants on both sides want to keep evidence secret, the “court has to separately make a determination.”

Purdue's lawyers argued that disclosure would stoke outrage and embarrass the company.

Noting the “tremendous” public interest in the information, Sanders said: “This material – some part of it or all of it – is going to come out one day. I'm not sure why it shouldn't be sooner rather than later.”

Tony LaGreca, whose son fatally overdosed after becoming addicted to opioids prescribed for a football injury, was in the courtroom that day. “She was pretty awesome,” he said of Sanders. LaGreca said parents like him are eager for the world to see evidence placing some responsibility for addiction on the drug companies. “It should be all made public,” he said.

In an emergency motion filed in Polster's Cleveland court, Purdue urged the judge to block Sanders from lifting the redactions. The Massachusetts lawsuit was full of details that could make the company look bad, a Purdue lawyer complained at a hearing, and the effort to get Judge Sanders in Boston to release them was an attempt to get around Polster's secrecy order.

Polster sympathized. “I'm not very happy with the Massachusetts AG either,” he said. But he decided he didn't have the power to overrule Sanders.

The next day, an unredacted version of the Massachusetts lawsuit was made public. The state used excerpts of emails between Purdue executives and board members and details from other records to bolster its main allegation: Purdue's sales campaign was a “deadly and illegal scheme to deceive doctors and patients” that had contributed to at least 671 fatal overdoses in Massachusetts since 2009.

The unredacted material supported allegations that, after pledging reforms in the 2007 plea agreement with federal prosecutors, Purdue pressed doctors to prescribe OxyContin to the elderly and military veterans, groups vulnerable to addiction. The state also alleged that Purdue sought to boost prescriptions for bigger doses, even though a 2012 internal analysis acknowledged that the more potent pills “very likely” carried heightened “dose-related overdose risk.” The underlying analysis remains under seal.

Purdue denies the allegations.

The unredacted material shows why doctors continued to write historically high numbers of OxyContin prescriptions even as deaths mounted, said Harvard Medical School professor Jerry Avorn. “It helps patients and doctors understand why so much OxyContin is being used.”



Judge Sanders declined to comment on the case. In product-liability cases generally, “the public has very much right to know what’s going on,” she said. “Transparency gives assurance that what’s going on is fair ... There’s no hanky-panky. There are no agreements between the parties that are contrary to the public interest.”

Polster has since ratcheted up the secrecy in his court. He signed a Feb. 11 order that allows litigants to designate any document as “highly confidential – attorneys’ eyes only information.” That bars disclosure to anyone – even the mayors and other state and local officials the lawyers represent – without signed permission from Polster or the litigant who produced it.

Last week, the Sixth U.S. Circuit Court of Appeals rebuked Polster for his secrecy orders, after the Washington Post and the Gazette-Mail of Charleston, West Virginia, appealed his sealing of government data on the flow of opioids around the country.

The three-judge panel unanimously agreed that Polster had not stated adequate reasons for allowing parties to file documents under seal, not just about the government data, but beyond. They ordered him to do so. Polster “is advised to bear in mind that the party seeking to file under seal must provide a ‘compelling reason’ to do so,” Judge Eric Clay wrote.

In the coming weeks, the plaintiffs will file their most extensive briefs yet about the opioid industry’s conduct. It will be up to Polster to decide what the public will be allowed to see.

Additional reporting by Charles Levinson, Andrea Januta, Erica Evans and Nathaniel Okun.

#### Hidden Injustice

By Benjamin Lesser, Dan Leviné, Lisa Girion and Jaimi Dowdell

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## How we did the data analysis

To measure the extent and impact of court secrecy, a team of Reuters journalists analyzed Westlaw data from 3.2 million civil suits filed in federal court between 2006 and 2016.

Reporters used a combination of artificial intelligence tools and manual case review. The computer-driven analysis, using a process known as machine learning, reviewed 90 million court actions and identified those in which material was filed under seal. This revealed that judges allowed litigants to seal material in at least 65 percent of product-liability actions.

But the docket descriptions are too brief to reveal the nature of the information filed under seal or what justification was offered for the secrecy. For that, reporters turned to the filings themselves and conducted a case-by-case review.

Court rules allow for sealing of records to protect company trade secrets and private information, such as medical records. What should not be sealed – without any meaningful justification by a judge – are records pertinent to public health and safety.

So Reuters sought to identify cases where public health and safety information was kept secret without explanation. Reporters read thousands of court filings from 115 of the largest mass product-liability actions from the past 20 years. These mass cases are known as multidistrict litigation actions, or MDLs. In an MDL, individual lawsuits are consolidated for all pretrial proceedings. Those lawsuits can sometimes number in the thousands.

Reporters determined the nature of the sealed material by reading unredacted passages or other public court documents that described the sealed content. At least 48 percent of the 115 cases they reviewed contained sealed public health and safety evidence. Reporters then checked the court dockets to see if the judge offered any justification for the secrecy. In 85 percent of the cases with sealed health and safety material, judges offered no reasoning in the court record.

During the MDL review, reporters also identified 31 cases where critical motions were filed entirely under seal, a practice court rules discourage because truly confidential information rarely encompasses an entire brief. The critical motions included in this count were:

- Summary judgment motions, which often lay out in detail the strongest evidence collected in support of or opposition to the plaintiff's claims.
- Daubert motions, which seek to exclude an expert witness and often discuss critical evidence in the case.
- In limine motions, which seek to preemptively exclude evidence from an upcoming trial.
- Class certification motions, which seek permission for multiple individual plaintiffs to sue as a group.
- Complaints, in which plaintiffs set out their claims against the defendants.



## HIDDEN INJUSTICE



SEEKING CLARITY: In her lawsuit against Propecia maker Merck & Co, Kelly Pfaff alleges that the company knew but hid from the public that the drug could cause the lasting sexual dysfunction and depression that she says led to her husband's suicide. REUTERS/George Frey

## Court let Merck hide secrets about a popular drug's risks

SEPTEMBER 11, 2019

Lawsuits claim baldness drug Propecia causes sexual problems and depression. The judge sealed evidence – uncovered by Reuters – suggesting the maker downplayed risks. A widow wants the truth out.

By DAN LEVINE



PARK CITY, Utah – By the time Kelly Pfaff got home from driving her son to school that morning, it was too late.

Her husband, John, was supposed to be taking their 4-year-old daughter to school. But the girl and the nanny were still at the Pfaffs' house near San Diego. So were John's wallet, cellphone and wedding ring. John was gone.

Kelly was alarmed, but not surprised. For four years, she had watched her husband, once a successful information-technology executive, avid skier and doting father, spiral inexplicably into despair.

It had started with dark, sulking moods. Then he lost interest in sex. His wife asked him if he was having an affair. "No ... Something's just not right down there," Kelly said her husband told her. Panic attacks set in.

He suspected the cause might have been Propecia, the popular Merck & Co drug he had been taking to treat hair loss since around the time his problems started. He quit the pills, but still he couldn't sleep, and he flashed random anger at the children. He started talking about killing himself.

On the morning of March 5, 2013, about 45 minutes before his wife got home, John Pfaff stepped onto the railroad tracks a block away and into the path of a southbound Amtrak train. He was killed on impact.

Kelly Pfaff blames Merck for her husband's death at age 40. In a lawsuit filed in 2015, she alleges that the pharmaceuticals company for years knew but concealed from the public that Propecia could cause the persistent sexual dysfunction and depression that led to her husband's suicide about a year after he quit taking the drug.

John Pfaff wasn't the only man who experienced sexual problems after taking Propecia. His widow's lawsuit was one of more than 1,100 filed across the United States and consolidated in so-called multidistrict litigation (MDL) in federal court in Brooklyn, New York. They accuse Merck of not adequately warning patients of the drug's possible side effects and their duration.

Merck has denied the allegations in court filings and declined to comment further on Pfaff's case. In a statement to Reuters, Merck said it "stands behind the safety and efficacy of Propecia," noting that the drug has been prescribed safely to millions of men since the late 1990s. While the drug's label lists erectile dysfunction and other sexual problems as possible side effects among a small percentage of men, the company rejects allegations that Propecia causes those problems to persist after men stop taking it or that it can lead to mental health issues. Merck says the symptoms themselves could be caused by a variety of other factors.

However, confidential documents reviewed by Reuters accuse Merck of exaggerating the drug's safety record.

Citing internal company communications, these legal briefs filed by plaintiffs' lawyers allege that in revisions to the drug's original 1997 label, Merck understated the number of men who experienced sexual symptoms in clinical trials, and how long those symptoms lasted. Other documents show that Merck knew roughly 20 years ago that sales of the drug would suffer if the public became aware of Propecia's possible

long-term effects on men's sexual health.

A redacted section of one plaintiffs' motion, reviewed by Reuters, cites correspondence from a Merck executive in which he objected to what he described as "misleading" information about the incidence of sexual dysfunction in men taking Propecia. That information was placed on the drug's label despite his comments, the court document says, and it remains there today.

Merck said that Propecia's label has always accurately reflected data from the company's clinical trials and that it disclosed all data to the U.S. Food and Drug Administration (FDA). Merck also said the executive's "misleading" comment was taken out of context in the court filing.

The documents reviewed by Reuters were filed under seal or heavily redacted by plaintiffs' lawyers – not Pfaff's – in federal court in Brooklyn. Merck had marked the documents confidential when sharing them with the plaintiffs' lawyers, and those lawyers didn't push to file them openly on the public docket. Judge Brian Cogan allowed the medical secrets contained in the documents to be kept out of public view. Reuters is able to report this confidential information now only after discovering filing errors that left some of it exposed.

Still under seal in Cogan's court are the internal Merck documents on which plaintiffs' lawyers based the allegations they made in the legal briefs Reuters reviewed.

Such court-sanctioned secrecy has become the lethal norm in product-liability litigation in the United States. As Reuters reported in June, judges in large product-liability cases routinely seal evidence relevant to public health and safety. As a result, hundreds of thousands of Americans have been killed or seriously injured by allegedly defective products — cars, drugs, guns, medical devices — while evidence that could have alerted consumers and regulators to potential danger remained under seal.

## DANGEROUS CONVENIENCE

Court secrecy has become pervasive even though, as a matter of law, court records are presumed to be public. Though exceptions can be made when national security, individual privacy or company trade secrets are at stake, the principle of open justice is rooted in American law. In most U.S. jurisdictions, judges are supposed to weigh a litigant's request for secrecy against the broader public interest in being able to see the evidence, and they must explain on record any decision in favor of secrecy.

They rarely do. Secrecy is convenient — for judges concerned about efficiency, for corporate lawyers concerned about protecting their clients' reputations, and for plaintiffs' lawyers seeking speedy resolution for their clients.

The Propecia case in federal court in Brooklyn has followed this familiar pattern. Judge Cogan has, without explanation, allowed Merck and plaintiffs' lawyers to keep information submitted in court confidential.

Some of these documents slipped through cracks in the wall of secrecy. One was inadvertently entered into the public record, staying in the open for a year before being sealed, but in the meantime, it made its way into an obscure public filing, where Reuters found it. The other was faultily redacted, making it possible for this reporter to read it. The contents of both are reported here for the first time, more than two years after the first was filed in Cogan's court.

Had he known the additional information about Merck's clinical trials, Nelson Novick, a dermatology professor at Mount Sinai School of Medicine in New York, said he would have been more cautious when prescribing the drug for young men. "I would have appreciated being apprised of this information earlier," Novick said.

Novick said any medical information about Propecia still being kept secret in court should be unsealed. "It goes without saying that the more information a physician has, the more he can share with the patient and the more informed the decision-making process becomes," Novick said.

Use of the drug remains widespread. It is now sold as Propecia and, since 2013, in generic versions under the chemical name finasteride. Last year alone, finasteride was prescribed for hair loss more than 1.6 million times in the United States, according to healthcare data company IQVIA. U.S. President Donald Trump has taken it, according to summaries of his past two annual physical exams.

From 2009 to 2018, the FDA received about 5,000 reports of sexual side effects or mental health side effects – and in many cases, both – occurring in men who took Propecia. Of those, about 350 reported suicidal thoughts, and about 50 said a patient committed suicide. The data do not show whether the symptoms resolved after stopping the drug.

Pfaff is among a small group of plaintiffs who haven't accepted settlement offers from Merck. She said she is pursuing her lawsuit not just for monetary damages, but also to bring to the public's attention anything Merck knows about mental health problems, particularly suicidal thoughts, that may be associated with Propecia. "If I can save a family from losing their husband, if I could just save one, that would mean the world to me," she said.

Judge Cogan did not respond to questions about why he has allowed the court filings to remain secret.

## RESOLVED IN 'ALL MEN'

Merck developed finasteride in the 1980s. The drug reduces a testosterone-related hormone in certain tissues, including skin and the prostate gland. Merck initially obtained FDA approval in 1992 to market finasteride in a five-milligram pill called Proscar to treat enlarged prostate. Five years later, the FDA approved a one-milligram version, which Merck named Propecia, to treat male pattern baldness.

From the beginning, Merck knew that Propecia could cause sexual dysfunction. In three clinical trials

Merck conducted prior to receiving FDA approval of Propecia, 3.8% of the hundreds of men who took the drug experienced sexual side effects, including erectile dysfunction or decreased libido.

That result has appeared on Propecia's label since the drug hit the market in 1997. The original label, based on a year of clinical trial results, also said the symptoms resolved in "all men" once they stopped taking the drug.

That's a crucial point for doctors and patients when considering a drug for treating a cosmetic problem. Even a slight risk of sexual dysfunction could give some doctors pause, but they would be reassured if a patient could reverse the problem by no longer taking the pills, said Dr Jerry Avorn, a professor at Harvard Medical School.

The distinction was also important to Merck, according to a sealed document Reuters was able to review because it was filed publicly elsewhere. A 1999 internal marketing study cited in the document found that 40% of men who had heard of Propecia were aware of potential sexual side effects, and that such knowledge would prevent half of those men from taking it. The court document does not say how many men were surveyed.

The sealed document also cites a 2016 sworn deposition in which a plaintiffs' lawyer asked former Merck marketing vice president Paul Howes: "So you knew internally that if these sexual adverse events were prolonged or lengthened or never went away, that that would be something that would impact sales in a negative way. Right?"

"Yes," Howes said.

Howes, who held that marketing job from 1998 until 2001, declined to comment for this article.

## RESEARCH SUBJECTS DROPPED

In 2002, more than four years after Propecia hit the market, Merck revised the drug's label to reflect the results of a study that expanded upon two of the drug's three original clinical trials. The original trials were one-year studies; the extended trials covered four additional years. All were conducted by Merck in the mid- to late 1990s.

The revised label retained the original label's statement that 3.8% of the 945 men taking Propecia in the first year of research experienced sexual side effects. But the company added that, among the 323 men who took the drug for all five years of the extended study, "the incidence of each type [of sexual side effect] decreased to no more than 0.3% by the fifth year of treatment."

A 60-page motion plaintiffs' lawyers filed in Cogan's court alleges that Merck's 0.3% figure on the revised label underreports the number of men who experienced sexual side effects during the extended study. The passages of the motion pertaining to the study were redacted. However, Reuters was able to view the blacked-out material after copying it from a digital version of the motion and pasting it into a document in a different format.

The motion cites an email in which a Merck analyst tells executives that 23 men taking Propecia experienced sexual side effects during the final three years of the expanded study. That phase comprised 922 men who took the drug for varying lengths of time, according to a 2002 article Merck published in the *European Journal of Dermatology*.

The label, as revised in 2002, omits the experiences of nearly all of those men, reporting only on sexual dysfunction in men who took Propecia in the first year of research and in those who took it continuously for all five years. Merck didn't include the experiences of men who finished the study before the fifth year or who were given placebo doses earlier in the study. The revised label also omitted information about six men who dropped out of the study during the final three years due to sexual side effects.

It is impossible from the numbers Merck has published to tell what percentage of men experienced sexual dysfunction over the full five years.

### 1.6 million

Number of times finasteride was prescribed last year to treat hair loss

It is "not fair or standard practice" to report results from only a portion of a multi-year study because it systematically underestimates the risk of any side effect, said Avorn, the Harvard pharmacoepidemiologist who reviewed the court filing and Merck's statements at Reuters' request.

Before the 2002 label change, Dr Keith Kaufman, clinical head of Propecia, discussed different ways of interpreting clinical trial data, the plaintiffs' court filing says. The 0.3% figure is "totally misleading" because, by the fifth year, "you have weeded out the dropouts with the sexual [adverse experiences]," the motion quotes him as saying. The legal filing does not specify who received Kaufman's correspondence.

Kaufman referred Reuters' questions to Merck, which said his remarks were unrelated to the language on the label. Merck said that he was referring to a flawed report submitted by an outside expert and that the company settled the litigation before it could provide proper context for Kaufman's comments.

Plaintiffs' lawyers filed Kaufman's original correspondence in court under seal, and it thus cannot be viewed. Merck declined to waive its claims of confidentiality to share that filing and the Merck analyst's memo with Reuters.

The redacted motion argues that Merck not only underreported the number of men who experienced sexual dysfunction while taking Propecia, but also concealed the duration of those problems. Citing the Merck analyst's memo, the motion says that of the 23 study subjects who experienced sexual side effects during the last three years of the study, seven continued to experience symptoms when they completed it. The symptoms of nine others resolved after they stopped taking the drug, but the time it took was unknown, the motion says. And of the six men who dropped out of the study, it says, one still had symptoms at least 66

days after stopping treatment.

Merck didn't know if some of these men's symptoms resolved, Kaufman said in a deposition.

None of this data described in the plaintiffs' motion was included on the revised 2002 label. Instead, Merck made a small but significant change to the label's language: Symptoms stopped in "men" who went off the pills, the label now said, rather than "all men."

Merck told Reuters that it followed up with patients who dropped out "in accordance with the protocols for the study." It said it has "consistently maintained that the available evidence does not establish that finasteride ... causes sexual dysfunction which persists after drug discontinuation."

Merck said it provided its five-year trial data to the FDA, which approved the revised label.

The FDA declined to answer questions about what Merck shared with the agency or how it evaluated specific information the company submitted about its Propecia clinical trials. It said it "takes very seriously its role in continuing to monitor and regulate the safety of drugs both before and once they are on the market."

Dr Michael Irwig, an endocrinology professor at George Washington University who has studied Propecia, reviewed the faultily redacted court filing for Reuters. He said Merck's numbers "look much better" by excluding men who dropped out, and the difference reflects an overall lack of transparency regarding subjects who experienced sexual side effects, he said.

In 2008, after Swedish regulators investigated reports that sexual side effects continued in men after they stopped taking the drug, Merck changed Propecia's label in that country to warn that erectile dysfunction had been reported to persist after stopping the drug.

The same year, Kelly Pfaff told her husband about Propecia. John's hair had started to thin on top. "For whatever reason, it bothered him," Kelly Pfaff said. She said she encouraged him to look into Propecia because she knew a friend was taking it and had hair "like a Chia Pet." She now regrets her advice. "I have to sleep with that every night," she said.

The label prominently warned pregnant women to avoid handling the drug. Kelly was pregnant with their daughter at the time, and she said John warned her not to touch the pills. She said he didn't mention any other risks.

Reports of depression in men taking Propecia were added to the U.S. label in 2010. This disclosure appeared in the "Postmarketing" section of the label, below the much more favorable description of Merck's clinical trial results added in 2002.

Meanwhile, the FDA had begun an inquiry after Merck changed its label in European countries to warn about persistent sexual dysfunction. In April 2012, the agency approved another change to the U.S. product label. The agency said at the time that "clear causal links" between the drug and sexual dysfunction had not been established. But, for the first time, the Propecia label acknowledged reports that a range of men's sexual problems persisted after the men stopped taking the drug.

A patient advocacy group, the Post Finasteride Syndrome Foundation, petitioned the FDA in 2017 to either withdraw Propecia from the market or add a black box warning for sexual and mental health side effects. The FDA has not yet responded to the request.

### MERCK BLAMES BALDNESS

The 2012 label change came as John Pfaff was hurtling toward his final crisis. He quit Propecia that spring, four years after starting treatment. Kelly Pfaff said her husband's decision to go off the drug wasn't prompted by Merck's label change, but more a process of elimination of possible culprits. She and her husband entered therapy together.

In a rambling email to his colleagues, he abruptly quit his job in January 2013. Two months later, he was dead.

Kelly Pfaff's lawsuit cites a peer reviewed study by Irwig, the academic endocrinologist, that found overlap between persistent sexual dysfunction and mental illness among 61 former finasteride users. In the study, 64% of men who experienced sexual problems after they stopped taking the drug also demonstrated moderate-to-severe depression, compared to none of a control group of men with hair loss who hadn't taken the drug. Forty-four percent reported having thoughts of suicide, compared to none in the control group.

Irwig found these rates to be higher compared to other studies of depression among men with sexual problems. He acknowledged he did not have specific comparative data on bald men experiencing sexual dysfunction. Other published studies have found that Propecia can lead to decreased levels of neurosteroids that act as natural antidepressants.

Some dermatologists have questioned whether selection bias tainted Irwig's findings and suggested that publicity and lawsuits could be artificially inflating the number of people reporting Propecia side effects. Merck said the study is "flawed" due to several factors, including a small sample size.

Nicole Rogers, a dermatology professor at Tulane University, said she counsels men on the possibility of side effects and tells them harmful impacts will go away if they stop. "For people who have a long family history of [hair loss], who are we to tell them they can't do it?" Rogers said.

After reviewing the information Reuters found on the Merck clinical trials, Rogers said the sexual problems the men reported could have been caused by other factors, including smoking.

Rogers's assessment echoed Merck's position. "Premature hair loss itself, the very condition for which Propecia is prescribed, is associated with low self-esteem, poor body image, and depression," Merck's lawyers wrote in a 2017 court filing. "Rather than attribute their sexual difficulties to the common reasons why young men with premature hair loss experience these problems, Plaintiffs instead assign blame to a drug that, once discontinued, is no longer pharmacologically active in the body."

Sales of Propecia climbed steadily through the 2000s, peaking at \$447 million in 2010. Soon after, Merck's patent expired, but use of finasteride remained strong as cheaper generic versions hit the market.

By then, hundreds of men were suing Merck over Propecia. In 2012, their lawsuits were consolidated before Judge Cogan.

**"It goes without saying that the more information a physician has, the more he can share with the patient and the more informed the decision-making process becomes."**

Nelson Novick, dermatologist, Mount Sinai School of Medicine

As part of the discovery process, the early phase of litigation when opposing sides request information from each other, the court issued a routine protective order, allowing each side to designate discovery material as confidential before sharing it. The plaintiffs then filed a small handful of those documents in court under seal, citing the protective order as justification for the secrecy.

Once evidence hits the courthouse, however, appellate courts have ruled that judges are required to conduct their own analysis of whether the secrecy outweighs the public interest in transparency. Cogan never did so.

In 2016, Cogan selected four of the Propecia lawsuits to go to trial first. The proceedings marked the first time that some of the evidence described in this article might have been publicly aired.

But Merck settled hundreds of the Propecia lawsuits in April 2018. The first trials were canceled, and the information remained under seal.

Merck agreed to pay a lump sum of \$4.3 million, according to a Merck securities filing, to be divided among plaintiffs who settled. In exchange, plaintiffs agreed to drop their claims against the company and not to discuss any confidential court documents, including any that were "inadvertently" filed in public and later placed under seal, according to a copy of one of the settlement agreements reviewed by Reuters.

Fewer than 25 U.S. cases remain pending, including Pfaff's. Her lawyers signed the protective order and are now reviewing some of the same discovery material Merck provided to other plaintiffs' lawyers. She says she hopes the case will give the public a full view of what Merck knows about Propecia.

Pfaff, who has moved with her children to Park City, Utah, said she thinks her husband would still be alive had he known how long Propecia's possible side effects could persist. "We do crazy things for vanity. But if we are going to do that, we should know what the risks are," Pfaff said. "I'm pretty sure if John knew he would poison his body, he would be bald."





COURT LET MERCK HIDE SECRETS ABOUT A POPULAR DRUG'S RISKS

**Hidden Injustice**

By Dan Levine

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## Reuters asks judge to release secret Propecia documents

By DAN LEVINE

SEPTEMBER 12, 2019

SAN FRANCISCO – Reuters asked a U.S. judge on Thursday to unseal documents filed in court regarding potential risks associated with Propecia, Merck & Co's (MRK.N) popular baldness drug.

The motion was filed in federal court in Brooklyn, New York, after a Reuters article on Wednesday revealed accusations that Merck did not fully disclose on Propecia's label the incidence and duration of sexual dysfunction in men who took Propecia in clinical trials. Those allegations are contained in court filings that had been intended to be filed under seal.

Federal District Judge Brian Cogan has allowed Merck to keep secret internal company documents in litigation brought by Propecia users against the company. A faulty redaction allowed Reuters to view some of the details in a plaintiff's brief, but the underlying Merck documents cited in that brief are still sealed. Those are the documents the Reuters motion seeks to make public.

"This is a case of tremendous importance that has been sealed without on-the-record findings explaining that sealing," Reuters argued in its motion to intervene in the case. "The First Amendment precludes such an outcome."

Merck did not respond to a request for comment. The company previously told Reuters it "stands behind the safety and efficacy of Propecia" and noted that the drug has been prescribed safely to millions of men since the late 1990s.

A June 25 Reuters investigation revealed how judges have allowed the makers of dozens of consumer products to file under seal in their courts information that is pertinent to public health and safety. They often do so without explanation, though in most jurisdictions, they are required to provide one.



A bottle of Propecia is seen on a pharmacy shelf in New York City, U.S., August 8, 2019. Picture taken August 8, 2019. REUTERS/Zachary Goelman



The investigation found that hundreds of thousands of Americans have been killed or seriously injured over the past couple of decades by allegedly defective products – drugs, cars, medical devices and other products – while evidence that could have alerted consumers and regulators to potential danger remained under seal.

More than 1,100 Propecia-related lawsuits filed across the U.S. against Merck were consolidated before Judge Cogan in so-called multidistrict litigation (MDL). Merck agreed to settle most of them last year for \$4.3 million, to be divided among the plaintiffs. Prior to the settlement, plaintiffs' lawyers cited internal company communications to allege that in revisions to the drug's original label, Merck understated the number of men who experienced sexual symptoms in clinical trials, and how long those symptoms lasted. Merck settled before responding to the allegation in court.

Under U.S. law, court filings are presumed to be public, and the bar for secrecy is particularly high for the Propecia documents Reuters seeks to unseal, the motion states, because they are essential to plaintiffs' claim that the drug causes persistent sexual side effects.

"These documents should not remain under seal absent the most compelling reasons," Reuters argued.

Mr. JOHNSON of Georgia. Thank you. I will now recognize Mrs. Schebel for 5 minutes.

**STATEMENT OF JODI M. SCHEBEL**

Ms. SCHEBEL. Thank you, Chairman Johnson and Ranking Member Roby for having me here today.

So I think the main thing that I would like to talk about is the fact that we have really got three areas. There are three stages with respect to litigation where confidential information that is maintained by a party might be put into the court record or might request to be sealed. The first is really through a protective order, and we have a court rule, Rule 26, Federal Rule of Civil Procedure 26, that governs the entry of a protective order.

And the rule specifically states, and this is 26(c)(1)(G). It states that "A court may issue an order to protect a party or a person from annoyance, embarrassment, oppression, or undue burden or expense," including that which relates to a trade secret or other confidential research development or commercial information, that it not be revealed, or it be revealed in only a specific way. So there is a court rule that prohibits or—excuse me—permits courts to keep certain information exchanged during pretrial discovery as confidential when parties have confidential information that is requested of them in a case.

The second stage is really where it comes in in filing of a motion. So you ask the court for some sort of relief in connection with a motion, and that you attach to it a party's confidential documents. That motion is going to be filed in the court record. We talked about PACER. It will be filed publicly so everyone can see it. But if a party's confidential information is appended to that filing, making that document public would or could strip that party of their property interest in the information that is contained in that document.

And so there is a way for litigants to request the court to seal the record. That is made upon a showing of good cause generally, unless that is a motion that affects the substantive rights of the parties. As long as it is during pretrial discovery, the standard is good cause. And as long as it is substantiated by the party and the lawyer demonstrates that there is good cause to seal the information, it should be sealed, and generally is sealed from the public record.

The last stage is really when you get to the adjudication of the merits of the case. So either that is at a summary judgment stage, or it could be a preliminary injunction. Some courts find that to be an adjudication on the merits, or it could be at trial. In that case, again, remember that the standard that the court employs, and it differs among the circuits, and this is set out in my written statement, the disparity and the differences between the circuits as to how they determine what the right standard is to seal. But in most instances, it is a compelling interest that in order to prevent the public from seeing a document that is appended to court filing that relates to the merits of the case, the party seeking to seal has to demonstrate a compelling interest to keep that information sealed.

In my experience, courts weigh that very carefully. It is a big burden to overcome. But yet we do it, and we do it on behalf of our

clients every day, so that we are balancing the public's interest to see information that the public has an interest in or might have an interest in, against our client's property interest in that information. And that could be confidential information. It could be a trade secret. It can be other intellectual property.

And, of course, the tenet of our judicial system is based on the concept that, you know, we are innocent until proven guilty. And when it comes to tort law, we are not talking about guilt. We are talking instead about some sort of a liability. But still, just because a corporate defendant has been sued does not mean that they are liable for whatever they have been sued for. They have an opportunity to litigate that fully. And just because they have been sued doesn't mean that their confidential information and their proprietary documents should be made public, you know, without them having an opportunity to show that there is a compelling interest to keep the documents as confidential.

And I think the rules that are set out in allowing the judiciary to have discretion to consider those motions when they are made by the litigants is the appropriate way to go.

[The statement of Ms. Schebel follows:]

Testimony before the House Subcommittee on  
Courts, Intellectual Property, and the Internet  
September 26, 2019

Jodi Munn Schebel

Bowman and Brooke LLP

Co-Managing Partner – Detroit Office

Author “Protecting the Record: Sealing Confidential  
Documents” ABA Practice Points (2017)

## I. Introduction

Thank you Chairman Nadler and Ranking Member Collins, as well as Sub-Committee Chairman Johnson and Ranking Member Roby, and the rest of the Sub-Committee for the opportunity to testify at this hearing.

I am the Co-Managing Partner of Bowman and Brooke LLP's Detroit office, which is a national products liability defense firm. Over the past 20 years, I have focused my practice on products liability defense, with an emphasis on discovery and e-discovery and act as national discovery counsel for several automobile and medical device manufacturers.

I am also a Barrister of the Detroit Chapter of the American Inn of Court, where I work with other Detroit area attorneys to educate and train new lawyers in the practice of law. I also serve on several discovery related national committees, speak regularly on the subjects of discovery and e-discovery, and am admitted to practice law in the Eastern and Western Districts of Michigan, as well as in the Sixth Circuit Court of Appeals.

In my work as defense counsel for companies that maintain proprietary and confidential information, I have developed an expertise in protecting my clients' data from unnecessary public exposure during litigation. The need to protect proprietary information arises in all phases of litigation, but is most prevalent during the discovery phase.

## II. Summary

When corporations or other business entities are named as parties in a lawsuit or served with a subpoena for documents, confidential, but relevant discoverable information maintained by the entity may be disclosed in the litigation. If the information sought constitutes a trade secret, intellectually property or other type of confidential business information, the disclosing party will need to protect that information from public dissemination to maintain that party's protected property interest. The main recourse that a party has to protect the confidentiality of its business information during litigation is to seek the entry of a protective order under Federal Rules of Civil Procedure 26.

Protective orders should be entered as a matter of course to protect a party's intellectual and other property interests in the confidential information contained in its documents or other material. A party should not lose those rights merely because it is involved in litigation. As a practical matter, that can happen when confidential documents are used to support or oppose a ruling on the merits of the case. This should not happen.

When a party to litigation asks the court to take some action or provide some relief on a case, the party files a motion with the court and supports that motion with record evidence. Sometimes, that record evidence contains documents that a party has designated as confidential, and which the parties are collectively restricted from filing publicly in order to protect one of the party's property interests in the documents or information. If a party files the confidential documents in the court's public case record system, that party may be in violation of a confidentiality order. However, if the party does not file the information, their position may not be fully supported to obtain the relief they seek from the court. To equalize these considerations, courts permit parties

to request permission to file confidential documents under seal. If granted, a sealing order permits the court to see the documents but shields them from public disclosure.

Courts apply different standards when determining whether to grant a sealing request. For a non-dispositive motion, a party need only show good cause, which rebuts the public's right of access to court filings, to seal a confidential document. This good cause standard is set by Fed. R. Civ. P. 26. The policy behind the rule is that the public's interest in full access to information that is not dispositive of the case's outcome is either not significant or is outweighed by a party's right to maintain the confidentiality of its documents.

Conversely, if a confidential document is filed with a dispositive motion (such as a motion for summary judgment under Fed. R. Civ. P. 56) or is used at trial, the public's interest in full access to the filing is greater. For dispositive motions, federal courts generally hold that the public has a presumption of right to access, which can only be overcome when a party articulates "compelling reasons" why the document or information is deserving of continued protection despite its use on the merits of the case.

Because the showing of a "compelling reason" may turn on the specific use of a document filed in support of a motion, courts regularly permit a party to seal confidential documents appended to a motion for summary judgment under Fed. R. Civ. P. 56 or to any other dispositive or merits-based motion that relies on a party's confidential information. This is generally true because the universe of such confidential documents is defined: The parties select and attach to their motion papers only those documents that support their respective positions. The party whose confidential information is among those documents can then move to seal from the public record, in accordance with applicable local court rules, only those specific documents over which they have a claim of confidentiality.

The use of confidential documents at trial, however, is another matter. When preparing for trial, the parties file and serve exhibit lists which identify documents that the parties may use during trial. In complex litigation, these lists often contain thousands of documents. In such cases, the effort to substantiate the need to seal each and every confidential document on a trial exhibit list would be extraordinary. Moreover, when filed before the trial even begins, the parties are left without context for the specific use to which the documents might be put, if they are even used during the trial at all.

To rectify this, courts should permit the conditional sealing of confidential documents before trial. Such a conditional sealing order should permit a party's confidential documents to remain sealed until a reasonable time after the conclusion of the trial. Then, after trial, the proponent of the sealing order should be required to file a request for sealing that is supported by record evidence, including affidavits or testimony substantiating compelling reasons why the documents or information should remain sealed. If no motion is filed, the conditional seal is then lifted and the documents become public. If a motion to seal is filed but denied by the court, the conditional seal is similarly lifted and the documents become public. However, if the motion is granted as to some or all of the confidential documents used at trial, such documents should remain sealed, thereby ensuring that the confidential information contained in the documents is protected from public disclosure. This will promote judicial economy in the spirit of Fed. R. Civ. P. 1, will afford parties the benefit of a court's decision on the merits in connection with their request to



seal, and will provide the proponent of sealing the most extensive opportunity to maintain confidentiality over its documents without chilling the public's right to access.

### III. Entry of a Protective Order

A confidentiality or protective order under Fed. R. Civ. P. 26(c) should be entered in any case in which a party's confidential documents will be produced. Such an order protects a party's confidential information from public disclosure and sets specific parameters for the dissemination or sharing of such information. Fed. R. Civ. P. 26(c)(1)(G) governs the entry of such protective orders. Under this Rule, a court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specific way." Fed. R. Civ. P. 26(c)(1)(G). The entry of a protective order is predicated upon a showing of good cause. Fed. R. Civ. P. 26(c)(1)(G). *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003) (requiring showing of good cause and specific prejudice or harm); *McCarthy v. Barnett Bank of Polk Cty.*, 876 F.2d 89, 91 (11th Cir. 1989) (party seeking protective order has burden of showing good cause); *Anderson v. Cryovac*, 805 F.2d 1, 7 (1st Cir. 1986) (allowing non-sharing protective order for good cause shown).

The trial court has complete discretion over the entry of document protective orders. *Seattle Times v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 2209 (1984) (Rule 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.")

While a protective order entered under Fed. R. Civ. P. 26 generally governs the *exchange* of confidential information during discovery, it does not typically protect confidential information from being filed in the public record. A party seeking to file confidential material in the public record at virtually any phase of litigation, including during discovery must demonstrate that the material is deserving of sealing.

In this regard, having a protective order that governs the parties' use of confidential documents exchanged in the case does not automatically create a sufficient legal basis for a court to place documents under seal. *Shane Group, Inc v. Blue Cross Blue Shield of MI*, 825 F3d 299, 305 (6th Cir. 2016) ("[T]here is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other . . . Secrecy is fine at the discovery stage, before the material enters the judicial record . . . At the adjudication stage, however, very different considerations apply."); *Beauchamp v. Federal Home Loan Mortgage Corp*, No 15-6067, 2016 WL 3671629, at \*4 (6th Cir. July 11, 2016) ("During discovery, courts often issue blanket protective orders that empower the parties themselves to designate which documents contain confidential information. Once the parties place a document in the record, however, very different considerations apply.").

#### IV. Sealing Documents from the Public Record

##### A. The Public's Interest in Filed Documents

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *The Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016). However, this general right of access to court records is not absolute. *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978). Rather, it requires balancing the public interest in the document against the interest of the party in maintaining the confidential nature of its business information. *See Healey*, 282 F.R.D. at 214. The presumption of access to court records may be overcome by the need to keep order and dignity in the courtroom or by a particularized special need for confidentiality, such as when trade secrets, national security, or certain privacy rights of trial participants or third parties are implicated. *See Brown & Williamson Tobacco Corp v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983).

##### B. The Standard for Sealing

The mechanism to shield court documents from the public is to have the court seal the information. Different sealing standards apply depending on whether confidential information to be withheld from public disclosure relates to a non-dispositive motion unrelated to the merits of the case or to a dispositive decision impacting the parties' substantive rights.

With respect to confidential information related to non-dispositive motions, the same good cause that is shown to identify materials as confidential and subject to a protective order under Rule 26 will generally be sufficient to allow a litigant to shield its confidential documents and information from public dissemination through a request for sealing.

On the other hand, documents supporting merits-based decisions, which are generally referred to as "court records" or "judicial records," are governed by a different standard given the public's long standing interest in access to such court records. The party seeking to seal documents related to a dispositive or merits-based decision by the court has the burden to show compelling reasons why sealing should be permitted. "The burden is on the party seeking to restrict access on a dispositive motion to show 'some significant interest that outweighs' the presumption of public access." *Colony Ins.*, 698 F.3d at 1241 (quoting *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007)). That is, if the public has a right of access to a court proceeding or record, then sealing the proceeding or record to preserve confidentiality must be narrowly tailored to meet the party's compelling interest.<sup>1</sup> *United States v. McVeigh*, 119 F.3d 806, 814 (10th Cir. 1997).

<sup>1</sup> *See also IDT Corp. v. Ebay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (a confidential document used at trial does not automatically become public because the common law right of access to judicial records is not absolute); *United States v. Webb*, 791 F.2d 103, 106 (8th Cir. 1986) (same); *In re Applications of Kansas City Star*, 666 F.2d 1168, 1176 (8th Cir. 1981) (same). "The court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed." *IDT Corp.*, 709 F.3d at 1223. Whether court records should be sealed "requires a weighing of competing interests" exercised in light of the relevant facts and circumstances of the particular case. *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990); *Independent Sch. Dist. No. 283, St. Louis Park, Minn. v. S. D.*, 948 F. Supp. 892, 898

The presumption in favor of access is particularly strong “where the district court used the sealed documents ‘to determine litigants’ substantive legal rights.” *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (quoting *Colony Ins Co v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012)). “The strongest arguments for access apply to materials used as the basis for a judicial decision of the merits of the case, as by summary judgment.” *Lucero v. Sandia Corp.*, 2012 WL 3667449 at \*7 (10th Cir. 2012) (quoting 8A CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2042, at 234 (3d ed 2010)).

In the Ninth Circuit’s decision in *The Center for Auto Safety*, the court discussed the different standards that apply to a request for sealing confidential information. There, the court held that the burden to seal documents from the court’s records turns on whether the filing relates to the merits of the case.<sup>2</sup> 809 F.3d 1092. If not, the proponent of sealing must only meet a good cause standard for restricting the public’s right to access the information. Conversely, if the filing is directly related to the merits of the case or is determinative of the litigant’s substantive rights then a party must meet a higher burden of showing that compelling reasons exist to overcome the presumption of the public’s right of access. *See also United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (the presumption in favor of access is particularly strong “where the district court used the sealed documents ‘to determine litigants’ substantive legal rights.”). As such, the standard to be applied—good faith or a compelling interest—to a request to seal documents is generally dependent upon whether the underlying issue considered by the court is dispositive of the party’s rights.

In order to substantiate that a party has a compelling interest sufficient to outweigh the public’s right of access, the proponent of sealing must “analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.” *Shane Grp.*, 825 F.3d at 305-06.<sup>3</sup> Further, “even where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason.” *See also*

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(D. Minn. 1996). Moreover, the property rights of the party seeking to maintain confidentiality must also be considered.

<sup>2</sup> The Second, Eighth and Tenth Circuits follow a dispositive versus non-dispositive analysis for sealing, but which predicated on the common law in determining whether the public has a right of access to documents filed with the court. Under the common law, the public only has a right to access “judicial documents.” A “judicial document” is one that is relevant to the performance of the court’s function and useful to the judicial process. To determine if documents must be accessible to the public, courts employ a three part test, considering: 1) whether the document a judicial document; 2) the importance of the information to the merits of the case; and 3) the importance of the competing considerations, including the privacy interests of those who oppose disclosure, when weighed against the presumption of access. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004); *see also IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013) (following the common law balancing test to determine whether the public’s right of access to “judicial records” outweighs the interests served by maintaining the confidentiality of the sealed information based on the specific facts of the case).

<sup>3</sup> The Sixth Circuit concluded that it was improper to file the documents under seal based on the district court’s protective order. The Sixth Circuit also rejected the party’s post hoc justifications—the parties had argued that the documents contained “competitively-sensitive financial and negotiating information.” The Sixth Circuit pointed out that such “platitudes” did not allow the sealing proponent to meet its burden, particularly since the proponent never even argued that the financial information at issue was a trade secret.

*Beauchamp*, 2016 WL 3671620 at \*4 (holding that the district court's order permitting sealing of certain records was not justified because the court had not satisfied its independent duty, "to set forth specific findings and conclusions which justify nondisclosure to the public"); *Rudd Equip Co., Inc v. John Deere Constr & Forestry Co.*, No. 16-5055, 2016 WL 4410575 at \*4 (6th Cir. 2016) ("[s]imply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records.") "A court's failure to set forth those findings and conclusions is itself grounds to vacate an order to seal." *Id.*

#### V. Requests to Seal Court Documents

When a party makes a motion to seal documents related to non-dispositive matters, the sealing motion is typically made at or near the time that the substantive motion is filed, and is supported with an affidavit or other testimonial evidence to establish a good faith basis to seal, i.e., that the documents and information at issue are confidential and deserving of protection from public review. This is generally a time sensitive (and consuming) effort, but is otherwise a rather straight forward process. As a practitioner in many courts around the country, I have not experienced significant concerns with respect to the filing of a motion to seal documents for non-dispositive motions.

The same is true when making a motion to seal documents on a dispositive motion. Although the standard is higher and generally requires a showing of a compelling interest as set forth above, the process is still fairly straight forward. It requires a document by document analysis as to the need for confidentiality and a showing of the (non-speculative) harm that may result if the information is publicly filed, weighed against the public's interest in the documents and information. At the preliminary injunction or summary judgment phase, motions to seal are filed at or near the time that the underlying motion is filed, and are typically ruled on concurrently with the motion on the merits.

The difficulty arises with respect to trial. A party potentially has three opportunities to move to seal confidential documents and information that may be used at trial: (1) before trial begins; (2) at the time the evidence is introduced; or (3) after the trial concludes. While it is necessary to raise the issue of sealing before trial begins, it is often impractical to require the proponent of sealing to substantiate its claim of confidentiality before the evidence has been introduced or otherwise used at trial.

The best time to require a fulsome motion to seal is a reasonable time after the trial has concluded and trial transcripts have been prepared. Then, and only then, will the party seeking to seal documents be in the proper position to determine which documents, if any, are deserving of continued confidentiality, particularly considering the specific use to which the documents were put in the case. Similarly, if sealing is considered after the conclusion of the case, the court has the benefit of the jury's verdict (or the court's own opinion) and can assess the importance of the public's right to access the documents against the property rights of the movant.<sup>4</sup>

<sup>4</sup> If a party's confidential documents are admitted or otherwise used at trial and testimony was offered in the record quoting or discussing those exhibits, a presumption may exist that such documents and testimony are public. *Healey*, 282 F.R.D. at 214.

If a party is required to file a motion to seal every confidential document identified on any of the party's exhibit lists because there is an outside chance the document might be used at trial and the party does not want to risk waiving confidentiality, that party would likely put significant effort into requesting that the court permit the sealing of documents that are never actually used, much less introduced, into evidence.<sup>5</sup> The court might similarly expend significant time and effort considering the party's request to seal each and every identified document. Requiring a party to file and support a motion in advance of trial to seal documents that are never shown to the jury is contrary to the tenants of Rule 1, which requires the just, speedy and inexpensive adjudication of litigation.

Furthermore, requiring a party to move to seal documents concurrently with their introduction into evidence or at the time of their use at trial is also untenable for several reasons. First, it interrupts the flow of the evidence. Second, it requires the parties to preemptively prepare the same document by document support for a sealing request as discussed above with respect to pre-trial motions to seal, so that the party is armed to substantiate their claim of continue confidentiality if and when any document from a party's exhibit list is used or introduced at trial. Third, making the motion at the time the document is introduced does not permit the court to take advantage of the full testimony (or lack thereof) that may be proffered for each individual document, thereby hamstringing the court's ability to properly weigh the facts.

The *Jochims* case is particularly instructive with respect to the proper timing of a motion to seal documents used at trial. See *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338 (S.D. Iowa 1993). There, Isuzu Motors was sued on a claim that its Isuzu Trooper was defective. The parties exchanged documents during trial, some of which related to Isuzu's engineering of the Trooper vehicle, which were subject to a protective order entered in the case. At the time of trial, the parties had contemplated the use of Isuzu's confidential documents at trial because the protective order provided that certain documents and testimony used at trial would be sealed. *Jochims*, 151 F.R.D. at 341. After trial, Isuzu communicated with the court regarding those documents that were subject to the sealing provision of the protective order. *Id.* Three lawyers prosecuting different cases against Isuzu moved to intervene and sought to unseal the record. *Id.* at 339. In overturning the magistrate's ruling to unseal the record, the court "balanced the competing interests involved," took into consideration "the confidential nature of the documents and the potential risk to Isuzu's competitive interests by dissemination," and held that the "public's interest in access to these specific documents does not override Isuzu's interest in maintaining the confidentiality of these proprietary confidential documents." *Id.* at 341-342.

As permitted in *Jochims*, instead of requiring preemptive filings, federal courts should permit confidential documents that are used or introduced at trial to be conditionally sealed. A *pro forma* motion to conditionally seal the documents could be made before trial by the proponent of sealing, with the full motion to seal made after trial concludes, so that the party seeking the sealing order can assess the viability of its request to seal against the outcome of the case, the use of the document(s) at trial, the testimony taken, and the general importance of the document to

<sup>5</sup> Worse yet, a party might decide not to substantiate a request to seal every confidential document identified on a trial exhibit list given the time and effort that would be necessary to file a properly supported motion, thereby waiving their property rights because of the inequity of litigation and the parties respective burdens on sealing.

the resolution of the litigants' claims.<sup>6</sup>

#### IV. Conclusion

Over the past 23 years, I have employed various means to protect my clients' rights to maintain confidentiality over their intellectual property, trade secrets and otherwise confidential information.

I have proposed and entered into stipulations with opposing counsel regarding confidential information that is used, introduced or admitted into evidence during trial, in which the parties agree that either party's use, introduction or admission of such documents at trial does not constitute a waiver of either party's claim of confidentiality and that whether documents claimed by a party as confidential can retain their confidentiality after use in a judicial proceeding is a question of fact to be decided by the court after receiving the evidence at trial.

I have also obtained orders to conditionally seal documents pending the conclusion of the case, after which the proponent of sealing will have a reasonable time (such as 30 days after certified trial transcripts are lodged) to file a properly supported motion to seal documents *and* testimony. This allows the court to consider the documents and testimony together, aiding judicial economy.

It is my experience that courts are generally willing to enter orders consistent with the parties' stipulation regarding sealing and document confidentiality, which provides the added benefit of having the court's approval of the process before trial commences and ensures that no one—neither the court nor the parties—are surprised when a motion to seal is made after the trial has ended. While there are likely other ways to protect the record and ensure that a party with an interest in confidential documents has an opportunity to file materials under seal after the conclusion of trial, the main goal is to prevent a waiver of confidentiality, while preserving both parties' rights vis-à-vis sealing.

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<sup>6</sup> As set forth in *Schedin v. Ortho-McNeil-Janssen Pharms., Inc.*, Civ. No. 08-5743(JRT), 2011 WL 1831597, at \*1-2 (D. Minn. May 12, 2011), whether a confidential document can maintain its confidentiality after use in a judicial proceeding requires consideration of the following factors: (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. These six factors are also known as the "*Hubbard*" factors, as they were first articulated in *United States v. Hubbard*, 650 F.2d 293, 318 (D.C. Cir. 1980).

Mr. JOHNSON of Georgia. Thank you, Ms. Schebel. Next we will hear from Mr. Hughes for 5 minutes.

#### STATEMENT OF SEAMUS HUGHES

Mr. HUGHES. Thank you. Chairman, Ranking Member, distinguished Members of the Committee, thank you for the opportunity to testify today.

Access to public records is an inherent right in a healthy democracy. The current system prevents the public from effectively exercising that right. As the deputy director of the Program on Extremism, I track the legal development of hundreds of Federal terrorism cases on a system called PACER, the acronym being the Public Access to Court Electronic Records. The name is a misnomer, though. Public access comes at an exorbitant cost, a cost that the general public cannot afford.

PACER is unnecessarily complex and convoluted. It is outdated. Simple tasks are hard to complete, and the costs are too high. Barring significant structural changes, the current approach will continue to fall short of its goal of providing access to the public.

Quite simply, it is not easy to access court records on PACER. The website routinely crashes, it kicks you out, and then it charges for said attempt. The National Case Locator does not get updates quickly, requiring the users to go to individual district sites to get a breaking court record. The individual court websites are also badly outdated. If you attempt to do a search for an individual charge, you might be out of luck because that charge hasn't been update with the latest statute. There is no way to do a nationwide search for individual charges of bribery, of terrorism, things like that. Quite frankly, the local rules of each district vary widely. The judiciary would do well set baseline standards and requirements for all local rules.

In some districts, documents that were once sealed and later unsealed by court order are never filed electronically on PACER. To access these documents, we are forced to build up an ad hoc system of local GW alumni who go to courthouses around the country for us and grab documents. Some districts have automatic unsealing at times, but those implementing the court order do not post the unsealed documents in a timely manner, which means you have to call a clerk's office, get it unsealed again, and then post it on PACER.

In other districts, there is no set time for unsealing, resulting in documents that remain sealed on eh criminal docket, even when there is no legal reason for the information to remain unsealed. In other districts, search warrants are always filed electronically, others none. Sometimes a little investigative spotlight shuts down the whole system.

In January, I found a search warrant related to a wide-ranging investigation into public corruption in the L.A. City Council. When I made that discovery public, the Central District of California locked down all search warrants filed on PACER. Most, if not all, search warrants recently filed in that district are no longer available online. This is against the spirit, arguably, of the letter of legislation requiring the public to have ready access to court filings, barring a court order sealing them.

Information on PACER is limited. The Program on Extremism repeatedly had to go directly to courthouses to receive documents on terrorism trials in the mid-2000s. Trial exhibits introduced into evidence are routinely unavailable in PACER. You have got to call the U.S. attorney's office or the defense attorney and get those documents. The naming convention for how documents are filed in PACER is not uniform. In some districts it is "United States v.," others "U.S. v.," "In the matter of," "U.S.A. v.," which makes it hard to do nationwide searches. You have got to know the naming conventions for local districts.

The Federal court fee system rakes in more than \$145 million annually from its users. However, the judiciary takes an overly broad reading of congressional intent, which calls for only charging reasonable fees. The judiciary states that approximately "87 percent of all PACER revenue is attributable to just 2 percent of users, large financial institutions, and major commercial enterprises." I am part of that 2 percent of users, the power used the judge called it. I do not feel particularly powerful using PACER.

I am neither a financial institution nor a major commercial enterprise. We are an academic institution tracking extremism in the United States. The judiciary may suggest that I could get a waiver, but that waiver process is completely convoluted, and if I get that waiver, I can't post the documents on our public website. I can't inform other researchers on how to get this stuff. I can't give it to policymakers and congressional staffers. Without this service, the public is less informed about the nature of the homeland threat.

There are a few proposed changes that would make a significant difference. One, baseline, make PACER free. Access is an inherent right in a functioning democracy. Two, the judiciary should set up a baseline standard for all local rules, which would provide guidance and direction on issues such as uniform naming conventions, sealing of documents, and the use of electronic devices.

Documents uploaded on PACER should be text searchable wherever possible. RSS feeds can be done tomorrow. If you turn on the RSS feeds for all the courts, that would open up access in a way you wouldn't have seen before. Court proceedings that are recorded should be posted on PACER as standard practice, assuming there is not a court order to seal. Finally, PACER as a website is maddening and it is must fixed. The changes on the margins will not be enough.

I appreciate the opportunity to testify today, and I look forward to your questions.

[The statement of Mr. Hughes follows:]



# Program on Extremism

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THE GEORGE WASHINGTON UNIVERSITY

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**“The Federal Judiciary in the 21st Century: Ensuring the Public’s Right of Access to the Courts”**

Written Testimony of:

**Seamus Hughes**

**Deputy Director, Program on Extremism**

**The George Washington University**

**September 26, 2019**

Chairman and Ranking Member, distinguished members of the Committee, thank you for the opportunity to testify today on a topic that impacts access to information – a right important to every citizen of the United States and a core value memorialized in our Constitution.

My name is Seamus Hughes. I am the Deputy Director of the George Washington University's Program on Extremism. In that capacity, I track the legal developments of hundreds of federal terrorism cases in the United States. In the last five years, our research team has downloaded more than 20,000 pages of court records including search warrants, criminal complaints, indictments, motions and transcripts of hearings by using a Court Information system called PACER – the acronym for Public Access to Court Electronic Records. The name is a misnomer – public access comes at an exorbitant cost<sup>1</sup> – a cost that the general public cannot afford. Access is limited to a privileged few, and I hope that at the end of my testimony today you will reconsider what public access means, or should mean, in a democratic country such as ours.

In addition to my work on extremism issues, I often use PACER to bring to public attention to information that would otherwise not see the light of day. Not only is PACER expensive, it is also difficult to traverse. It is only by learning and working around the idiosyncrasies of PACER that I have been able to inform the public of matters that would otherwise remain buried. For example, the arrest of a U.S. Coast Guard official with alleged white supremacy beliefs, the indictment of Wikileaks founder Julian Assange, an intelligence analyst who tipped off a family member that they were under investigation, the closing of the investigation into a serial bomber, an Islamic State-funded terrorist plot in Maryland, and corporate espionage that resulted in the chief executive of Walmart's emails being secretly monitored, are just a few.<sup>2</sup>

A website created for the public should be user friendly and easy to navigate. But, PACER is the opposite; it is difficult to understand and even more difficult to navigate. In order for the media to use court records more efficiently, I have led training seminars for journalists at the New York Times, Reuters, Associated Press, Wall Street Journal, CNN, USA Today, and the Financial Times. In the last six months, I've trained hundreds of journalists on how to use PACER.

In both my academic research and journalistic endeavors, I have found access to federal court records through PACER unnecessarily complex and convoluted. PACER is outdated, simple tasks are difficult to complete, and costs are too high. Barring significant structural changes, the current approach will continue to fall short in its goal of providing robust access to the public and will only stymie public curiosity for knowledge.

<sup>1</sup> Whenever possible, we use RECAP, a tool created by the non-profit Free Law Project (<https://free.law/recap/>). RECAP allows for the free download of documents that have already been purchased by others. Unfortunately, given the nature of our research, we are typically the first to download the documents. That said, our use of RECAP ensures the next set of researchers can keep their costs down and we would encourage others to also use it.

<sup>2</sup> For a more complete list, see <https://seamushughesconsulting.com/results>

### Public Right of Access is Thwarted

Quite simply, it is not easy to access public court records on PACER.<sup>3</sup> PACER provides access to federal criminal records and is organized by federal districts in each state. To use the system you need to apply for a PACER account, get a password, and know what district in each state you want to search. Each search requires the user to know what they are looking for and where. Even then the cost is not always tied to a result.

On a daily basis, I am kicked off the search results for no discernible reason, yet am still charged for my search and forced to restart the process. If the search results are longer than four pages, the system routinely brings you back to the landing page. The national case locator does not get updates efficiently, requiring users to go to the individual district site if there is a breaking court record. The individual court websites are also badly outdated. If you attempt to do a search for an individual charge, you may be unable to access it, because the dropdown option has not been updated with the latest criminal statutes.<sup>4</sup>

There is no way to do a nation-wide search for individual charges. For example, if you are a terrorism researcher and want to review every case that charges material support to a terrorist organization, you would have to go to 94 different individual court websites and conduct a new and separate search on each website. Each search would cost you at least ten cents; each download would cost you more.<sup>5</sup> And, because PACER won't allow you to track a case (unless you are an attorney on the case), you would have to run the same search routinely or your data

<sup>3</sup> Some may argue that PACER is a better system than the byzantine stem of state and county court records. On that narrow point, they are sometimes correct. But that does mean it is a good system.

<sup>4</sup> For example, 18 USC 1039 (fraud and related activity in connection with obtaining confidential phone records information of a covered entity) is not an option for the dropdown box.

<sup>5</sup> The Program on Extremism has run this search 94 times over the last four years. As a result, we identified terrorism cases where there was no public pronouncement of the charges.

would be stale. The story repeats itself for other tasks, such as staying up to date with the opinions written by the courts, which also requires a visit to 94 separate websites.

In districts such as Minnesota and New Jersey, documents that were once sealed, and later unsealed by court order, are never filed electronically on PACER. To access these once sealed, now unsealed records, we are forced to rely on an ad hoc system of local networking; we search for local George Washington University alumni or reporter colleagues who would not mind going to the clerk at the local federal courthouse, provide the court docket number to the clerk, who then manually pulls the documents and gives them to us but only to have them copied at the courthouse Xerox machine that charges 10 cents a page. Back at their offices, our volunteers then scan the documents and send us the pdf.

Some districts have automatic unsealing after a set time, but those implementing the court order do not post the unsealed documents in a timely manner which necessitates a call to the clerk's office to get a document ordered unsealed, and then unsealed on PACER. In other districts, there is no specific set time for unsealing, resulting in documents remaining sealed on the criminal docket even when there is no legal reason for the information remaining under seal and inaccessible to the public. Quite frankly, the local rules for each district vary widely. The Judiciary would do well to set baseline standards and requirements for local rules.

Trial exhibits introduced into evidence are routinely unavailable on PACER. This then requires the public to reach out to the local U.S. Attorney's office or defense attorneys to receive the documents. Some offices are forthcoming in providing information, while others ignore the request given their overburden work demands. Resources are wasted – the attorney has to sanction the release, then a paralegal has to copy it and send it out.

Lest the committee think that trial exhibits are not of consequence – it was only because our review of trial exhibits in the case of *United States v. David Wright*, the Program on Extremism able to identify an American featured in a beheading video that which was used as propaganda by the Islamic State. Without the exhibits we would not have been able to inform the public that an American had risen to be a commander in the Islamic State and was front and center in their propaganda videos.<sup>6</sup>

The naming convention for how documents are filed in PACER is not uniform. In some districts, documents are filed as "United States v.," or "US vs.," still others "In the matter of". Even within the district, the naming conventions are different depending on whether it is a criminal or civil case. Additionally, search warrants are not tied to the individual but instead are tied to the item to which law enforcement is attempting to access. So, if you are looking for a search warrant related to a federal bribery case of a public official, your search for "John Smith" would be futile but a "search of usb key" with no discernible link to the defendant would get you the result you want.

<sup>6</sup> Seamus Hughes, Alexander Meleagrou-Hitchens, and Bennett Clifford (2018), "A New American Leader Rises in ISIS," *The Atlantic*. <https://www.theatlantic.com/international/archive/2018/01/isis-america-hoxha/550508/>

In some districts, search warrants are filed as “mj,” or “mc.” In others, they are filed as “sw”. In the national case locator, you can limit your search to only “mj” or “mc” but you cannot for “sw”. As such, documents filed as “sw” are completely inaccessible.

In other districts, search warrants are always filed electronically. Sometimes a little investigative spotlight shuts down the whole system. In January, I found a search warrant related to a wide-ranging investigation into public corruption in the Los Angeles City Council.<sup>7</sup> When I made my discovery public, the Central District of California (CDC) locked down all search warrants filed on PACER.

Most, if not all, search warrants recently filed in CDC are no longer accessible online. This action is against the spirit, and arguably the letter, of the legislation requiring that the public have ready access to court filings barring a court order sealing them.<sup>8</sup>

Information on PACER is limited. The Program on Extremism has had to repeatedly go directly to courthouses to receive documents from terrorism trials in the mid-2000s. This is a burdensome task as there is no uniformity in the availability and timing of court transcripts and the transcripts are voluminous.

<sup>7</sup> Emily Alpert Reyes and David Zahniser (2019), FBI Corruption Probe of L.A. City Hall Focuses on Downtown Development Boom,” *Los Angeles Times*. <https://www.latimes.com/local/lanow/la-me-ln-fbi-investigation-chinese-development-20190114-story.html>

<sup>8</sup> In the other extreme, sometimes search warrants provide too much information to the public. For example, using Facebook user IDs, a *Forbes* reporter was able to identify the names of child abuse victims. I have routinely flagged this issue for prosecutors with limited success. See also Brewster, Thomas (2019), “FBI and DHS Blunders Reveal Names of Child Abuse Victims Via Facebook IDs,” *Forbes*. <https://www.forbes.com/sites/thomasbrewster/2019/06/19/fbi-dhs-failures-reveal-names-of-child-abuse-victims-through-facebook-identities/#57149c82fe83>

Finally, the restrictions on electronics in courtrooms is outdated and varies, depending on local rules. In a federal courthouse in Maryland, you can bring your electronics into the courtroom. In places like the Eastern District of Virginia, you cannot.<sup>9</sup>

### Costs

The federal court record fee system brings in more than \$145 million annually from its users. However, the federal judiciary takes an overly broad reading of congressional intent which called for only charging reasonable fees. When reviewing the breakdown of costs provided to the Judiciary, only \$22 million of the fees are used towards access to public records.<sup>10</sup> While still an exorbitant cost for a website which does not allow for simple text-based searches, it is incorrect to say that making PACER free will require an offset of \$145 million.

Each PACER search costs 10 cents. That includes when one makes a mistake in the search, which is typical for a system that has no uniformity between districts. And that is just for the search: to download or print the document will cost you more—10 cents per page, as if PDFs somehow become prohibitively more expensive to create the longer they are.

The Judiciary states that “approximately 87 percent of all PACER revenue is attributable to just 2 percent of users—large financial institutions and major commercial enterprises that aggregate massive amounts of data for analysis and resale.”<sup>11</sup> I am part of the 2 percent of users; but the Program is neither a large financial institution nor a major commercial enterprise. We are an academic institute tracking extremism in the United States. The Judiciary may suggest that we could apply for a waiver of fees, but that exemption would still limit our ability to inform the public and that would defeat the purpose of accessing a public record. The waiver would not allow us to make the records public. Our Program places thousands of pages of terrorism-related court records online for the benefit of policymakers, the media, and fellow researchers.<sup>12</sup> Without this service, the public would be less informed on the nature of the homeland threat.

### Proposed Changes

- Make PACER free; access is an inherent right in a functioning democracy. Just as we use taxes to pay for courthouses, we should use taxes to pay for court transparency.
- There should be a uniform standard for filing documents on PACER so that they do not vary from district to district.
- Documents uploaded into PACER should be text searchable.

<sup>9</sup> This restriction of electronics has given rise to a small cottage industry. In Alexandria, Virginia, for example, a coffee shop across the street from the courthouse charges five dollars to store electronics for reporters and the public while they are attending court sessions.

<sup>10</sup> Other costs include Violent Crime Control Act Notifications, which while a necessary and commendable effort, is not related to the public’s right to access public court records. The Courts should go through the normal congressional budget process to request funding for such notifications.

<sup>11</sup> United States Courts (2019), “Judiciary Adopts New Model EDR Plan, Doubles Fee Waiver for PACER,” *US Courts*. <https://www.uscourts.gov/news/2019/09/17/judiciary-adopts-new-model-edr-plan-doubles-fee-waiver-pacer#pacer>

<sup>12</sup> The Program on Extremism at George Washington University, “The Cases.” <https://extremism.gwu.edu/cases>

- RSS feed should be turned on – and many of the ones that do have their feed filtered to only certain types of documents. The public's access to court information would be greatly enhanced if all courts turned on complete RSS feeds for recent filings in their court. The CM/ECF system supports this, and it appears to be a simple setting some courts have turned off. In addition to the RSS fix, PACER would do well to create a system that would alert users when new documents are filed in specific cases.
- Court proceedings that are recorded should be posted on PACER as a standard practice.
- The Judiciary should set up baseline standards for all local rules to follow which would provide guidance and direction on issues such as sealing and use of electronic devices.

Thank you for the opportunity to testify on the public's right to access of federal court records. I look forward to answering your questions.

Mr. Johnson of Georgia. Thank you. Ms. Hostin, 5 minutes.

# **STATEMENT OF SUNNY HOSTIN**

Ms. HOSTIN. Mr. Chairman and members of the committee, thank you for inviting me today. I am especially thrilled to be seated with my good friend, Jeff Toobin. We were colleagues at CNN and spent most of our time sparring about nuance points of law. While we often disagreed and I was almost always right, I believe we are on the same page today.

I haven't done the research, but I have been told that I am the only network African-American journalist with a journalism degree, a law degree, I am a former Federal Prosecutor and a Member of the Supreme Court Bar. So I am somewhat of a unicorn, not the most qualified person perhaps to give a perspective, but I do believe I have a unique perspective representing a particular community.

The absence of cameras in Federal proceedings and in Supreme Court, in particular, has a profound effect on African-Americans in the U.S. The judicial system disproportionately affects the African-American community in this country because African-Americans are the most incarcerated people in the world because the U.S. criminal justice is the largest in the world. African-Americans are 5.9 times as likely to be incarcerated than white Americans.

As of 2001, 1 of every 3 black boys born in 2001 could expect to go to prison in his lifetime. My son was born in 2002, so I take this rather personally. The vast majority of African-Americans distrust the American judicial disproportionately than other Americans. The descriptors most often used: "unfair," "illegitimate," "excessive."

African-Americans, though no different than most Americans, learn about the intricacies of the criminal justice system through the news media. However, African-Americans consume more news media than any other group in the U.S. African-Americans watch 37 percent more television than any other demographic. They also consume more social media and more streaming. In my view, given these facts, there exists no better cure for the fundamental mistrust and perceived illegitimacy of the system than the transparency of the court that define it, in particular, the highest court in our land.

The constitutional right of the public to attend proceedings is critical and indeed has been upheld by the Supreme Court. While it is a congressional right to attend every proceeding, no American is able to do so. A constitutional substitute for the level of judicial transparency demanded and envisioned by the framers is necessary if the trust of those most affected is to be restored and maintained. In my judgment, that substitute is television or livestreaming proceedings.

Public access to a judicial proceeding must not be limited to seeing a report of a decision distilled by a journalist, more often than not without a legal background. Many of my legal journalist colleagues go to a 3-day law school course to prepare them for a career as a legal journalist. I watch as well-intentioned reporters doing the very best they can, with networks in a rush to be first, get the law wrong instead of getting it right. There is no better ex-



ample in recent history than when the ACA decision came down. Audiovisual coverage of proceedings improves the media's overall ability to accurately report on proceedings. When televised, accuracy is a given. Veracity is a given. Charges of fake news easily dismissed. The courtroom camera always gets it right.

Thank you, Mr. Chairman, for the opportunity to testify before your committee today.

[The statement of Ms. Hostin follows:]

**TESTIMONY OF SUNNY HOSTIN, ESQ,  
CO-HOST, THE VIEW, ABC NEWS  
FORMER ASSISTANT UNITED STATES ATTORNEY, DISTRICT OF COLUMBIA  
BEFORE THE  
UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON THE  
JUDICIARY**

Mr. Chairman and Members of the Committee, my name is Sunny Hostin. I am a Co-Host of The View on ABC News and a former Assistant United States Attorney for the District of Columbia. Thank you for inviting me to appear today.

At the Committee's request, I will address the issue of media coverage of federal court proceedings, and in particular, whether federal court proceedings, including those of the Supreme Court, should be televised or live streamed. At present, radio and television coverage of federal criminal and civil proceedings at both the trial and appellate levels is effectively banned. Similarly, while audio of Supreme Court oral arguments is made available to the public at the end of each argument week, contemporaneous live radio and television coverage is verboten.

I would like to direct my remarks to the effect that the absence of cameras in criminal federal proceedings and the Supreme Court has on African Americans in the United States in particular. The judicial system disproportionately affects the African American community in the United States. African Americans are the most incarcerated people in the world because the United States criminal justice system is the largest in the world. According to *The Sentencing Project*, by the end of 2015, over 6.7 million people were under some form of correctional control in the United States, including 2.2 million incarcerated in federal, state, or local prisons and jails. The rate of incarceration in the

United States dwarfs the rate of nearly every other nation. In this country, African Americans are more likely than white Americans to be arrested, convicted and receive lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely. As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos—compared to one of every seventeen white boys. Disparities among women are less substantial than among men but are nevertheless prevalent. The United States in effect operates two distinct criminal justice systems: one for white people and one for people of color. *The Sentencing Project report submitted to the United Nations on Racial Disparities in the U.S. Criminal Justice System on April 19, 2018.*

Unsurprisingly, the vast majority of African Americans distrust the American judicial system disproportionately to other Americans and perceive it as unfair. *Pew Research Center, 2014. The Sentencing Project* found that the descriptors most often used by people of color to describe their own experiences with the justice system or the system in its entirety are “unfair, illegitimate, and excessive.” People of color, not personally impacted by criminal justice policies, like myself, have family members who have been. In one national survey, half of African Americans reported having a close friend or relative who was currently incarcerated, in contrast to one out of ten white respondents. *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies, Nazgol Ghandnoosh, Ph.D. September 3, 2014.* Education does not lessen the fundamental distrust of the judicial system. In fact, more highly educated African Americans are more skeptical of the criminal justice system than their less-

educated counterparts. *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, Nazgol Ghandooosh, Ph.D. 9/3/14.

African Americans, no different from most other Americans, learn about the intricacies of the criminal system through the news media; however, they consume media disproportionately than their white counterparts. African-American consumers continue to lead the consumption of content across multiple platforms, according to a recent Nielsen 2019 Diverse Intelligence Series (DIS) report on African Americans. Nielsen's *It's In The Bag: Black Consumers' Path to Purchase* report indicates that in the first quarter of 2019 African Americans spent more than 50 hours watching live and time-shifted television a week, over 10 hours more than the total population. According to Nielsen, African Americans watch 37% more television than any other demographic. African American consumers also are more likely to consume new media, spending more time consuming video on their smartphones as compared to the total population. Nielsen reports that African Americans spend nearly 30 hours a week on websites and apps on their smartphones, more than three hours more than all consumers as a whole. *African Americans are Leaders in Media Consumption*, R. Thomas Umstead, September 15, 2019.

There exists no better cure for fundamental mistrust and perceived illegitimacy of the judicial system than transparency of the courts that define it, including the highest court in the land. The right of the public to attend trials is critical in that regard and it has been upheld by the U.S. Supreme Court. This is consistent with the Founders' view of the Third Branch, a judiciary whose only power is judgment, the effect of which depends on the trust and confidence of the citizens it serves. To be sure, while they may have the right to see each and every federal and Supreme Court proceeding, no American is able to do so, a substitute for that level of judicial

transparency is necessary if the trust of those most affected by the justice system is to be acquired, restored and maintained. Televising or live streaming is, in my judgment, that substitute.

Supreme Court Justices seem to have had varying opinions on the propriety of having cameras in the courtroom. For example:

**Chief Justice John G. Roberts Jr.**

“We’re going to be very careful before we do anything that might have an adverse impact.”

— *Ninth Circuit judicial conference, July 13, 2006*

**Justice Antonin Scalia**

“Not a chance, because we don’t want to become entertainment.”

— *CNBC interview, Oct. 10, 2005*

**Justice Anthony M. Kennedy**

“... [T]elevising our proceedings would change our collegial dynamic. ...”

— *House Appropriations subcommittee, March 8, 2007*

**Justice Clarence Thomas**

“... [S]ecurity is on the foremost of all our minds now since 9/11. ...”

— *House Appropriations subcommittee, March 8, 2007*

**Justice Ruth Bader Ginsburg**

“A decision of this issue ... should be decided after really pretty serious research and study. ...”

— *American Bar Association panel, Nov. 10, 2005*

**Justice Stephen G. Breyer**

“... [A]t the moment, I think it’s quite uncertain what the answer is.”

— *Interview, C-SPAN, Dec. 4, 2005*

**Justice Samuel A. Alito Jr.**

“I will keep an open mind despite the decision I took in the Third Circuit [in favor of permitting camera coverage].”

— *Confirmation hearing, Jan. 11, 2006*

**Justice Sonia Sotomayor**

“I have had positive experiences with cameras.”

— *Confirmation hearing, July 14, 2009*

**Justice Elena Kagan**

“I think it would be a great thing for the institution, and more important, I think it would be a great thing for the American people.”

— *Confirmation hearing, June 29, 2010*

Once on the Court, those opinions, if in favor of transparency have morphed into almost uniform opposition. Justices have given varying reasons for opposing transparency from a change in the camaraderie on the Court, misleading impressions of the Court, potential showmanship by the Justices and even the obstreperous presence of

cameras. Respectfully, none of these reasons is sufficient to override the public's constitutional right to access, in real time, to the proceedings of the highest court in our country, which is necessary to the rebuilding and maintenance of trust in our criminal justice system. The experience of state court judiciaries, at least at the high court level, belies these rationalizations. Prior to becoming a prosecutor, I clerked for a judge of the Maryland Court of Appeals, Maryland's Supreme Court. That Court, in 2006, began videotaping and live streaming its oral arguments and other proceedings. Significantly, the first case live streamed was *Conaway v. Deane*, 401 Md. 219 (2007), involving same sex marriage. None of the parade of horrors occurred or has occurred since. Indeed, both judges and lawyers see the live streaming as an asset for the Court and the former Chief judge of that Court believes it contributes to the public's trust and confidence in the Court. I am not aware of any contrary view from any of the state courts that are live streaming their arguments.

Public access to a judicial proceeding must not be limited to seeing a report on television, often times distilled by a journalist without a legal background. As one of the only Afro-Latina journalists with a federal prosecutorial background, I am often tasked with interpreting complex legal issues and cases on television. I have experienced firsthand the confusion of the intricacies of the legal system and the desire to understand its complexities by communities of color. I have also seen networks in a rush to be first, get the law wrong, instead of getting it right. The Court's refusal to allow cameras has led to the very things the Justices fear - misinterpretation, distrust and confusion. In the hundreds of thousands of proceedings covered electronically across the country since 1981, to my understanding, there has not been a single case where the presence of a

courtroom camera was found to have any effect on the ultimate result. Indeed, audiovisual coverage of proceedings improves the media's overall ability to accurately report on them. Such coverage affords all reporters and the public instantaneous access. Proceedings can be verified not by reading a transcript (which are transcribed by stenographers thus allowing for human error), but just by playing back an audio or videotape. Accuracy is a given. Veracity is a given. The courtroom camera always gets the story right.

Thank you, Mr. Chairman, for the opportunity to testify before your committee today.



Mr. JOHNSON of Georgia. Thank you. Last but not least, Mr. Toobin. Five minutes.

#### STATEMENT OF JEFFREY TOOBIN

Mr. Toobin. Thank you for the opportunity to testify, Mr. Chair and Ranking Member. My name is Jeffrey Toobin. I am a staff writer at The New Yorker and the chief legal analyst for CNN. My views today are my own.

I graduated from law school in 1986. After a judicial clerkship, I had the honor of being a Federal prosecutor for 6 years, first with the Office of Independent Counsel and then as an assistant United States attorney in the Eastern District of New York, Brooklyn. There is no greater privilege for a lawyer than to appear in a courtroom representing the United States.

I joined The New Yorker in 1993 and CNN in 2002. I am working on my eighth book about the Mueller investigation and now Ukraine. Two of my books, *The Nine* and *The Oath*, were about the United States Supreme Court, which I have covered as a journalist for more than 20 years. I have also had the opportunity to cover many high-profile trials, including those of O.J. Simpson, Timothy McVeigh, Martha Stewart, and Michael Skakel. Some were televised. Some were not.

I should note that in the course of my work in the Federal courts, I have had the occasion to try to rely on the PACER system many times. Frankly, PACER is a disaster, and I would like to express my appreciation in particular to Congressman Collins, who has been such a leader in trying to reform PACER.

My point here today is simple. The Sixth Amendment mandates public trials. In the 21st century, the only meaningful definition of “public” is one with audio and visual access. By now, we as a Nation have a lot of experience with cameras in the courtroom. In the States where it is legal and in the Federal experiments, we have seen by and large the public educated and the cause of justice advanced. Here is one example.

I suspect many of you remember the case of Amadou Diallo, the unarmed immigrant from Africa, who was mistakenly shot and killed by four white New York City police officers in the Bronx in 1999. The judge in that case granted a change of venue to Albany, but he allowed cameras. The public saw the trial, which ended in acquittals. Before the trial, there were worries that the acquittals would lead to violent reactions in New York as in the Rodney King case in Los Angeles. But I think the fact that the public got to see the trial and hear the officers’ testimony for themselves contributed to the peaceful reaction in New York. Every one could tell it was a hard case, even among people who disagreed with the verdicts. Cameras helped keep the peace.

At the Supreme Court, all the justices, without regard to their ideological orientations, are protective of the institution. They don’t want to jeopardize the respect the Nation has for their judgments. They are understandably cautious about making changes, but over the years, the Court has made changes. It installed a sound system in the courtroom. It changed the arrangement of the bench. It streams audio of the arguments, albeit with a significant delay. At a minimum, livestreaming of Supreme Court audio would be a

major positive step and pose no risk at all to the customs of the Court.

But live audio, which would be an improvement, is not enough. Cameras are necessary. As for the Supreme Court, I need hardly remind this committee of the importance of their decisions. As Congressman Chabot, who has long been a leader on this subject, has long reminded us, the justices pass judgment on the constitutionality of your actions, but you are prohibited from watching them do so. That is not right, and that is not fair.

And here is one more fact to consider about the Supreme Court. I have been with many people who are attending their first Supreme Court argument, and they almost all say the same thing. "Wow, the justices are impressive." "They know their stuff." "They are well prepared." "They are working hard." I suspect if there were cameras in the courtroom, the broader public would say the same thing, and I look forward to that day. Thank you for the opportunity to testify here.

[The statement of Mr. Toobin follows:]

Jeffrey Toobin

Staff Writer, The New Yorker; Chief Legal Analyst, CNN

September 26, 2019

House Judiciary Committee

Subcommittee on Courts, Intellectual Property and the Internet

"The Federal Judiciary in the 21<sup>st</sup> Century:

Ensuring the Public's Right of Access to the Courts"

Thank you for the opportunity to testify, Mr. Chairman. My name is Jeffrey Toobin. I am a staff writer at the New Yorker magazine and the chief legal analyst at CNN. My views today are my own. I graduated from law school in 1986. After a judicial clerkship, I had the honor of being a federal prosecutor for six years - first with the Office of Independent Counsel and then as an Assistant United States Attorney in the Eastern District of New York. There is no greater privilege for a lawyer than to appear in a courtroom representing the United States.

I joined the New Yorker in 1993 and CNN in 2002. I am working on my eighth book, about the Mueller investigation. Two of my books - The Nine and The Oath - have been about the United States Supreme Court, which I have covered as a journalist for more than twenty years. I've also had the opportunity to cover many high-profile trials - including those of O.J. Simpson, Timothy McVeigh, Martha Stewart, and Michael Skakel. Some were televised. Some were not. I should note that in the course of my work in the federal courts, I have had occasion to try to rely on the PACER system many times. Frankly, PACER is a disaster, and I'd like to express my appreciation in particular to Congressman Collins, who has been such a leader in the effort to improve PACER.

My point here today is simple. The Sixth Amendment mandates "public" trials. In the twenty first century, the only

meaningful definition of 'public' is one with audio and video access. By now, we as a nation have a lot of experience with cameras in the courtroom. In the states where it's legal, and in the federal experiments, we have seen the public educated and the cause of justice advanced. Here is an example. I suspect many of you remember the case of Amadou Diallo, the unarmed immigrant from Africa who was mistaken shot and killed by four white New York City police officers in the Bronx in 1999. The judge in the case granted a change of venue to Albany, but he allowed cameras. The public saw the trial, which ended in acquittals. Before the trial, there were worries that acquittals would lead to a violent reaction in New York, as in the Rodney King case. But I think the fact that the public got to see the trial - and hear the officers' testimony for themselves - contributed to the peaceful reaction in New York, even among people who disagreed with the verdict. Cameras helped keep the peace.

At the Supreme Court, all the Justices, without regard to their ideological inclinations, are protective of the institution. They don't want to jeopardize the respect the nation has for their judgements. They are understandably cautious about making changes. But the Court has already made changes. It installed a sound system in the courtroom, it changed the arrangement of the bench, it streamed audio of its

arguments, albeit with a significant delay. At a minimum, live streaming of Supreme Court audio would be a major positive step and pose no risk at all to the customs of the Court. But live audio, which would be an improvement, is not enough. Cameras are necessary.

As for the Supreme Court, I need hardly remind this committee of the importance of their decisions. As Congressman Chabot has long reminded us, the Justices pass judgment on the constitutionality of your actions - but you are prohibited from watching them do so. That's not right. That's not fair.

Here's one more fact to consider. I've been with many people who are attending their first Supreme Court argument, and they almost all say the same thing. Wow, the Justices are impressive. They know their stuff. They are well-prepared and working hard. I suspect, if there were cameras in the courtroom, the broader public would say the same thing, and I look forward to that day.

Many thanks for this opportunity.

Mr. JOHNSON of Georgia. Thank you. I will now recognize myself for questions for 5 minutes. Ms. Girion and Mr. Levine, were you surprised by what you ultimately reported on, and what is one takeaway from your work that you think is important for Congress to know?

Ms. GIRION. I think we were surprised at the prevalence of secrecy in the courts that went unexplained by the judges, and where we had no opportunity to understand what the rationale was, and what factors were weighed, and how the law was applied in those decisions. So that was a big surprise to us. And I think, I mean, one takeaway that I have is, as the other panelists said here today, you know, access and transparency of court proceedings is vitally important to, you know, the public trust in the institution.

But the court's transparency goes beyond that. When people who use products and may be harmed by them don't have an opportunity to learn information about them that is filed in court and is part of a, you know, a major dispute, you know, that is a real significant problem and a real harm.

Mr. JOHNSON of Georgia. Thank you. Ms. Hostin, in your testimony you described the challenges of being a journalist with a legal background who is often called on to explain the complexities of an ongoing criminal case. How would greater camera or audio access to court proceedings help you do your job better?

Ms. HOSTIN. I certainly think it would make my job a lot easier because I am now not in the position of having to regurgitate what happened because the viewer can see it for himself and herself. Now I am in the position of explaining perhaps the law. I am in the position of analyzing the law. That is very different than having sort of the burden of explaining exactly what happened.

The other piece of it is that it provides, I think, access for other reporters as well. You need only press "rewind" to make sure that we all get it right as opposed to just relying on one person. It is just very, very clear that the few of us that have the ability to be in the courtroom, it is a very, very heavy burden to get it right each and every time. And we also have the added burden of our networks wanting us to be first, and that can be very problematic.

Mr. JOHNSON of Georgia. Mm-hmm. Mr. Toobin, do you have anything to add?

Mr. TOOBIN. Well, you know, one of the pieces of advice that journalists and all writers get is show, don't tell. You know, show people, don't tell them, and that is what cameras in the courtroom are allowed to do. And also just, you know, we really try to be accurate as much as possible, and if we can show what the judge is saying, what is actually going on in the courtroom as opposed to putting it through our own filter. You know, we do our best, but we make mistakes. But as Sunny said during her testimony, the cameras don't lie, and I think cameras would be simply a force for accuracy, and that is nothing but a good thing.

Mr. JOHNSON of Georgia. Thank you. Mr. Hughes, I think you had a chance to hear the testimony from the Judicial Conference about PACER. Is there anything about that testimony that you would like to address?

Mr. HUGHES. Sure. Respectfully, I think they were arguing facts not in evidence. When you look at some of the arguments being if

we open it up free, then the website will crash. Well, that is not a valid argument to not allow access for the public on these things. When the judges talked about, well, an outside or third party could file to unseal, well, that is true in some districts, but in Maryland where there was an ongoing in the first-of-its-kind Isis-funded plot going on trial, I filed to unseal the 70 documents. I was denied because the local rules don't allow for non-lawyers to file for unsealing, which then I had to go to GW's counsel to file a motion, right? We are restricting the ability for the public to have access to information they should have, and the website does not allow for it.

So if you look at John Smith gets arrested and John Smith is a terrorist, and I want to look at John Smith, I also want to look at the search warrant associated with John Smith, and that search warrant is always unsealed right before trial. But that search warrant is not tied to John Smith's name, so I have to search every single search warrant in that district to find John Smith's search warrant just to get more information as a researcher to understand the nature of the threat. It is not user friendly. It is not useful for researchers. It is painful.

Mr. JOHNSON of Georgia. Thank you. Ms. Schebel, in the case of a civil litigation and there is a pattern and practice that is apparent that judges are sealing documents, sealing pleadings without stating in an order the reasons for doing so, and there is no third parties that are contesting the sealing of a document, what is the legislative branch to do? And if you would——

Ms. SCHEBEL. Sorry. I think the courts are doing a great job of analyzing the public's interest in information that comes to the court as a court document and weighing that against corporate litigants' interests in their private property or their confidential documents. I think the courts are doing a very good job of weighing that. What the legislature is to do, I think, is to leave that in the court's discretion.

It is, as Judge Story said earlier, and I think we were all here to hear that testimony, that, you know, stripping the judiciary of its discretion and enacting some sort of a legislation to supplant what the judiciary has expertise in doing would not help the legal system. And I don't think it would further the interests of either the plaintiffs or the defendants, whether it is a corporate party or an individual who wants to see information protected.

Mr. JOHNSON of Georgia. Thank you. With that, I will now turn to the Ranking Member, Representative Roby, for 5 minutes.

Mrs. ROBY. Thank you, Chairman, and I will try not to be repetitive. I may ask you to just go a little bit further than you have in your previous answers. But, again, thank you all for being here, and thank you for your candidness and your willingness to appear before this committee.

Mr. Hughes, I particularly appreciate the level of detail that you went into. All of my questions have been answered by your testimony here today, but I would like to suggest since you were here in the room with the first panel, that we were referred to the working group Electronic Public Access, the Public User Group. I think that you contribute greatly to the courts' openness in that working group. I am not really sure how it is set up——



Mr. HUGHES. I applied. I am waiting to hear back.

Mrs. ROBY. Okay. Well, good.

Mr. HUGHES. The jury is still out.

Mrs. ROBY. I am encouraged to hear that because I do think that because you are a user of PACER, a power user—is that what it was—I think you could really, really help give some insight moving forward about how to improve upon the PACER system. And then I would just ask, Ms. Schebel, if you would just, we were just talking about judicial discretion. And the things that I really wanted for you to focus in on and maybe expand upon is, you know, there have been arguments out there that we should mandate that evidence related to public health and safety should not be sealed. And so I just wanted to give you an opportunity to maybe even dive a little deeper in your response to those arguments beyond what you might have already stated.

Ms. SCHEBEL. Sure. I mean, I think it is important to recognize that just because a party is sued, and let's say that that party is a manufacturer of some sort, whether it is a drug or a consumer product. It doesn't really matter, but that party has been sued. There hasn't been a finding that the product injures the health, safety, you know, welfare of the general public until the finding is made, and usually that is after trial. Until that time, I think that corporate defendants have an interest in protecting their property and their intellectual property rights that are set forth in their documents.

And, again, just because someone is sued, they shouldn't lose those rights to their documents until there has been some sort of a finding. And even if there is a finding made, so even if you get to trial and even if there is a ruling that a product is defective or has caused harm in some way, there is an appellate process, and sometimes an appeal after that one that is permitted in the Federal courts. And so information, again, should not be made public provided the corporate defendant can substantiate that there is a compelling need to maintain the documents as confidential. They just shouldn't be public, and to make them public before that finding has been made really would strip those corporate defendants of their property rights and their documents.

It really isn't any different than someone's Social Security Number or having your own personal information made public, say your medical information made public. Corporate defendants have the same interest in privacy to their documents as you do in your medical records. And I think that that has to be respected in the process and has to be respected by the courts.

Mrs. ROBY. Thank you. Mr. Toobin, never ask a witness a question you don't already know the answer to, right? But I am about to ask you for your perspective, and I don't actually know what you are going to say. But you referenced in your oral testimony and in your written testimony about the opportunities that you have had to cover many very high-profile cases over your career, some of which have been televised and some which have not. And you were also present for the conversation we had with the first panel where you heard from Judge Story that it was mixed reviews on having cameras in the courtroom, but he specifically cited behavior. And so I am curious based on your experience in both televised trials

and those that have not, how you perceived those cameras in the courtroom affecting behavior.

Mr. TOOBIN. It is a great question, Congresswoman, and I can't, you know, give you a blanket answer for every case. And I certainly understood the perspective of the judge who said, well, maybe in certain circumstances people's behavior was affected. I am not going to lie to you, not least because the chairman told me it would be a crime if I did. But the O.J. Simpson case was one where, I think, the cameras affected it, and unfortunately that has had a poisonous effect on this whole debate, even more than 2 decades later.

But with the exception of the O.J. Simpson case, which was so aberrational in so many ways, my impression has been that the cameras mostly are forgotten about after about a day in the courtroom, that people just go about their business. And I guess if there was one thing I objected to about the way the judge characterized it, he said, well, there was a possibility of a problem here and a possibility with the, you know, witnesses and with the judge. You know, I think that is a backward way of looking at it. I think the presumption should be on openness. The presumption should be that people get to see these trials, and if there are certain circumstances that require, you know, closing a courtroom to cameras.

But the idea that every time the cameras have to justify themselves and have to prove a negative, that people will not be affected, I think that is not the right way to look at it. And I think the public will never get the appropriate access if that is the way we think about it.

Mrs. ROBY. Well, again, my time has expired, and I just want to thank the panel for, again, your candidness and appreciate you all taking the time to be here today. So thank you very much.

Mr. JOHNSON of Georgia. I will now yield 5 minutes to the gentleman from Ohio.

Mr. JORDAN. Thank you, Mr. Chairman. I appreciate you having this hearing. Mr. Toobin, this morning on national television, you said in talking about the whistleblower complaint relative to the phone conversation the President of the United States had with the president of Ukraine, and the President's conduct relative to that country, you said "Today's Justice Department has been corrupted." Is that an accurate representation of the statement you made—

Mr. TOOBIN. It sure is.

Mr. JORDAN. And you were making that relative to the complaint that was filed and that you guys were talking about in the, it was a group discussion on the show this morning. Is that right?

Mr. TOOBIN. Yep.

Mr. JORDAN. Okay. Have you read the Department of Justice statement relative to this matter?

Mr. TOOBIN. I have.

Mr. JORDAN. I might just read it here so we all have it. "The President has not spoken with the Attorney General about having Ukraine investigate anything relating to former Vice President Biden or his son. The President has not asked the Attorney General to contact Ukraine on this or any other matter. The Attorney General has not communicated with Ukraine on this or any other

subject, nor has the Attorney General discussed this matter or anything relating to Ukraine with Mr. Giuliani.” You are familiar with that.

Mr. TOOBIN. I am.

Mr. JORDAN. And you stand by your statement that the Justice Department—

Mr. TOOBIN. I sure do.

Mr. JORDAN [continuing]. Is corrupt, and it is based on what the whistleblower said in the complaint.

Mr. TOOBIN. No, it is not based entirely on that.

Mr. JORDAN. I just asked you what you were talking about the whistleblower, and you said it was based on the whistleblower. You said the Justice Department is corrupt based on what you saw in the complaint.

Mr. TOOBIN. It was based on the whistleblower’s complaint. It was based on the partial—

Mr. JORDAN. Well, it was based on the whistleblower’s complaint—

Mr. TOOBIN. In part and if you let me finish my answer, it is also based on the further—

Mr. JOHNSON of Georgia. I am going to interject and caution my friend from Ohio that this subject is not germane to this hearing, and it is disruptive, and it is disrespectful to our process—

Mr. JORDAN. Mr. Chairman, you have been through this—

Mr. JOHNSON of Georgia [continuing]. That we would have—

Mr. JORDAN. Respectfully.

Mr. JOHNSON of Georgia. Well, no, let me finish.

Mr. JORDAN. All right.

Mr. JOHNSON of Georgia. It is disrespectful to the process that we would bastardize it for political purposes. It is within my discretion to allow you to continue along this line, and I am going to allow you to continue. But I just want to caution you that in the future, I am not going to tolerate this kind of imposition in my subcommittee hearings.

Mr. JORDAN. All due respect, it is entirely germane. Plus I would like my time—

Mr. JOHNSON of Georgia. It is my decision that—

Mr. JORDAN [continuing]. Reset at 3 minutes, 35 seconds.

Mr. JOHNSON of Georgia. I will restore. Well, you have no right to demand that.

Mr. JORDAN. The heck I don’t.

Mr. JOHNSON of Georgia. But I will—

Mr. JORDAN. The heck I don’t.

Mr. JOHNSON of Georgia. No, you don’t.

Mr. JORDAN. It was my time, and it was 3:35.

Mr. JOHNSON of Georgia. No.

Mr. JORDAN. And I have every right to ask. The witness actually in his opening statement brought up Ukraine. I didn’t. The witness said on national television the very statement I said that he said on TV, and he said he agreed that that was an accurate representation of what he said. He brought up Ukraine in his opening statement.

Mr. JOHNSON of Georgia. I am going to—

Mr. JORDAN. You know I have full discretion to ask the kind of question I want——

Mr. JOHNSON of Georgia. I am going to——

Mr. JORDAN. And I need 3 minutes and 35 seconds on the clock.

Mr. JOHNSON of Georgia. I am going to restore your time.

Mr. JORDAN. I appreciate it.

Mr. JOHNSON of Georgia. I am going to ask you that in the future, you respect the integrity——

Mr. JORDAN. This is——

Mr. JOHNSON of Georgia. Hold on. I want to respect the integrity of my subcommittee hearings and not bring in this extraneous issue that has——

Mr. JORDAN. Would you yield for a question?

Mr. JOHNSON of Georgia [continuing]. That has no——

Mr. JORDAN. Would the chairman yield for a question?

Mr. JOHNSON of Georgia [continuing]. That is not germane to this particular——

Mr. JORDAN. This is the Judiciary Committee. We have a witness testifying in front of the Judiciary Committee who today on national television said the Justice Department is corrupt. If that is not relevant, tell me what is for this committee.

Mr. JOHNSON of Georgia. No, this hearing is about secrecy in the judicial——

Mr. JORDAN. That doesn't change the fact that the witness brought up Ukraine in his opening statement. This morning on national television he said the Justice Department is corrupt.

Mr. JOHNSON of Georgia. Mr. Jordan. Mr. Jordan, if we are going to have a discourse, I am going to need for you to listen to me just as I am listening to you. I object to you bringing this subject into his hearing because it is not germane, but I am going to allow you to continue.

Mr. JORDAN. Thank you, Mr. Chairman.

Mr. JORDAN. But I am going to ask that in the future, you limit yourself to this hearing intruding with extraneous material such as this. And with that, I will yield to you——

Mr. JORDAN. I will do my best, Mr. Chairman.

Mr. JOHNSON of Georgia. Well, thank you, and I will yield you 3 minutes and 30 seconds to continue your questioning.

Mr. JORDAN. A witness who said this morning this morning the Justice Department is corrupt on national television, basing that, at least in part, earlier said, basing it on the whistleblower complaint. We need to remember a few things about this whistleblower. He has no firsthand knowledge of the phone call. He wasn't on the call. But we do know one thing about this whistleblower, Mr. Toobin. He had a political bias. We learned that from the inspector general. The inspector general told us there was indicia of arguable political bias. Do you know what that is? That is Washington speak for this guy hated Trump. And yet that is the basis for our witness telling us that the Justice Department is corrupt. Let me give you some facts——

Mr. TOOBIN. Would you like an answer?

Mr. JORDAN. I will in a second. Let me give you a few facts just to give a little context to this, facts that happened in the Justice Department prior to Bill Barr taking over the Justice Department,

in fact, things that happened in the Obama Justice Department. Are you familiar with this, Mr. Toobin? That the Obama Justice Department FBI spied on two Americans associated with the presidential campaign? Are you familiar with that? Are you familiar with the fact that the Obama Justice Department FBI's opened a counterintelligence investigation on the Republican Party's presidential candidate and didn't tell the candidate they had an investigation, a counterintelligence investigation, opened on him? Didn't tell him what was going on? Are you familiar with the Obama Justice Department's FBI allowed Peter Strzok and Andy McCabe to run that investigation? Peter Strzok, the guy who said, don't worry, Lisa, we will stop Trump. Trump should lose 100 million to zero. Andy McCabe.

This is not Jim Jordan talking. This is now the inspector general. The inspector general said Andy McCabe lied 3 times under the oath. The inspector general, Michael Horowitz, said that Peter Strzok should have never been allowed to head up that investigation, not because he had this bias against Clinton or bias against Trump in favor of Clinton, I should say, but because he ran the Clinton investigation. He should have been prohibited from running that. But the Obama Justice Department allowed it to happen.

The Obama Justice Department allowed the Clinton Campaign, paid for a document, the dossier, to be used to go to a secret court, Mr. Toobin, to spy on one of the people associated with the Trump Campaign. And the former FBI director leaked information through his friend to the New York Times in an effort to get a special counsel, which he was successful in doing. And finally, I would just say this. On January 6th, the Obama Justice Department went to the Trump Tower when it was President-elect Trump, January 6th, 2017. They told the President-elect he was not under investigation, all the while trying to set him up as part of their Trump-Russia investigation.

And, again, not my words. That was in the report released just 3-and-a-half weeks ago by the inspector general, Michael Horowitz. And yet today, based on a whistleblower that had no firsthand knowledge, wasn't on the phone call, has a political bias against the President, you are saying this Justice Department is somehow corrupt.

Mr. TOOBIN. Well, if you want to just to talk about the whistleblower, one of the extraordinary things about the whistleblower was that in the whistleblower's report, there is a summary of the phone call between the President of the United States and the president of Ukraine. And, of course, as you point out, the whistleblower did not have access to the partial transcript that we have now seen. But notwithstanding the absence of firsthand access to that transcript, the whistleblower summary of that phone call was extremely accurate, which suggests a great deal of credibility on the part of the whistleblower, wouldn't you say?

Mr. JORDAN. How do you know it is extremely accurate?

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. JORDAN. Mr. Chairman, are you kidding me?

Mr. JOHNSON of Georgia. Yes, it has expired. The gentleman's time has expired, and let me say that—

Mr. JORDAN. Are we doing a second round?

Mr. JOHNSON of Georgia. It won't be a second round on this line of inquiry.

Mr. JORDAN. The heck it won't.

Mr. JOHNSON of Georgia. No, it won't. And I want the gentleman to know that the next time he comes in——

Mr. JORDAN. Would the Chairman allow one more question for Mr. Toobin?

Mr. JOHNSON of Georgia. No, I want the gentleman to know that the next time he comes into my subcommittee and disrupts it in this way, that we——

Mr. JORDAN. How is this disruptive?

Mr. JOHNSON of Georgia. Yeah, because you are off topic. And so if this should happen again, I am going to be prepared through our rules to hold you accountable. And with that——

Mr. JORDAN. Mr. Chairman, the rules allow me to ask the question I want to ask. The only thing disruptive is your behavior in limiting and interrupting my questions. It was my 5 minutes. You interrupted. I got one more question that I would appreciate being able to ask the witness.

Mr. JOHNSON of Georgia. With that, the gentleman is no longer recognized, and I will proceed to——

Mr. JORDAN. That is how the Democrats are going to——

Mr. JOHNSON of Georgia. I will proceed to round two of the questions, and I have a question for Hostin and Mr. Toobin. Gallup regularly surveys Americans' views of the Supreme Court, and for years, approval or disapproval of the Court has fallen on partisan lines. This partisan divide can depend on which part has the most representation on the bench or even the outcome of certain decisions from the previous term. I am interested in both of your views on whether the Supreme Court's secrecy plays a role in this divide and how providing video access would help ease the divide.

Ms. HOSTIN. I think there is no question that providing more transparency will help that. And this is purely anecdotal, but I had the opportunity to interview Justice Sotomayor recently in New York about 2 weeks ago at the 92nd Street Y regarding her new book, her children's book. The audience was a sold-out audience. It was filled to capacity. And I can tell you while we did not address any current political issue, any current legal issue, as per the Justice's wishes, there was a line around the block of people that could not get into the event, and they also waited for 3 hours, those that were admitted to the event, for her signature on the books and just to meet her.

And I stayed the entire event, and what I heard over and over again was she just seems like a regular person. She is so wonderful. She is so warm. They just wanted to get to know her. And I think given an experience like that, if more Americans were able to just see the justices on television, just to see them doing the business of the Court, if we were able to pull back the curtains, I think, as my friend, Jeffrey Toobin said earlier, we would get that reaction more and more and more. I mean, I think Justice Brandeis said it very clearly, "Sunlight is the best disinfectant." I think we would have much more trust in our system if people were able to

see the justices and get to know them, and see the business of the Court.

Mr. TOOBIN. Mr. Chairman, I have a somewhat different view. I really don't know if more access would mean more respect for the Supreme Court. I don't have that ability to predict. My own sense is that the reason the Court has fallen in public estimation is that it is bound up, as so many institutions in our country are bound up, with the partisan divisions that are so familiar to us. It is increasingly seen as, you know, as driven along partisan lines as the Congress, as the race for the White House. And I think that is what really is driving the diminished respect for the Court.

I see public access to the Court as an independent value. I don't really see it as an instrument to make the Court more popular. I think it is a good thing in and of itself.

Mr. JOHNSON of Georgia. I am sorry. I want to thank the witnesses for coming today.

Mr. JORDAN. Mr. Chairman, you get two rounds of questions and I——

Mr. JOHNSON of Georgia. And with that, the hearing is adjourned. The hearing is adjourned.

Mr. JORDAN. We were told there was a second round of questions. This is truly unbelievable the way you guys do——

[Whereupon, at 4:13 p.m., the subcommittee was adjourned.]

## **APPENDIX**

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Statement of Steve Leben  
Judge, Kansas Court of Appeals  
September 26, 2019

For the hearing, "The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts," Subcommittee on Courts, Intellectual Property, and the Internet, Committee on the Judiciary, United States House of Representatives.

Chairman Johnson, Ranking Member Roby, and members of the Subcommittee, I appreciate the opportunity to submit these comments for your consideration. I am a member of the Kansas Court of Appeals, a statewide intermediate appellate court, where I have served since 2007. Before that, I served as a Kansas state trial judge for nearly 14 years. I am a past president of the American Judges Association (2007), and I also teach part-time at the University of Kansas School of Law. I speak here only on my own behalf, not as a representative of my court or any organization.

We all know that we live in a time of diminished levels of trust for public institutions and public officials. While our country functions best with a healthy level of respect for and a strong sense of the legitimacy of the United States Supreme Court, the events of the past two decades have diminished those levels in ways we should be concerned about. One important way the Court can address this problem of diminished public trust is by increasing the transparency of its work. Opening its oral arguments to the public—through real-time radio, television, and web access—would be an

important move toward the transparency that could bolster public perceptions of the Court's legitimacy and fairness.

The Gallup organization regularly surveys public opinion about the Supreme Court.<sup>1</sup> Since the *Bush v. Gore* decision in 2000, there has been a partisan divide in the way Americans view the Court. In 2001, Republican approval of the Court was at 80% but Democratic approval was only 42%. The same numbers were fairly close—60% (for Republicans) and 70% (for Democrats)—before the start of the Court's October 2000 term.

Since 2000, the partisan divide has been noticeable. Republican approval levels remained high—and Democratic approval levels low—until the election of President Obama. But they quickly flipped, with 75% of Democrats approving and only 49% of Republicans approving of the Court as it started its October 2009 term. After the Court's 2015 decisions upholding the Affordable Care Act and the right to same-sex marriage, Republican approval fell to 18%—with Democratic approval at 76%. And before the Court began its October 2018 term last year, with a Republican president and two new

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<sup>1</sup> The Gallup data cited here can be found at Justin McCarthy, *Women's Approval of SCOTUS Matches 13-Year Low Point*, Gallup online, Sept. 28, 2018 (includes link to past data), available at <https://bit.ly/2lipxcC>.

Republican appointees, Republican approval was back at 67%, with Democratic approval at 36%.

I have great concerns about the long-term ability of our Supreme Court to carry out its role in our democracy if public support for its decisions comes through such a starkly partisan lens. Another divide in views about the Court emerged in Gallup's survey before the opening of the Court's October 2018 term—a gender divide. In the past, there had been no significant difference between men and women in approval levels; in one 2017 survey, 50% of men and 49% of women approved of the Court. But in the September 2018 Gallup survey, 60% of men approved compared to only 42% of women. That too would be a troubling divide should it persist.

So what can the Court do about this? Obviously the justices must continue to decide cases based on their best understanding of the law. But a *process* change to make the Court more transparent—by opening its hearings to cameras—would be an important step toward greater public legitimacy.

Social-science scholars have shown in both law-enforcement and justice-system contexts that heeding procedural-justice principles leads to a greater sense of legitimacy, more positive opinions, and greater compliance with orders. Professor Tom

Tyler of Yale Law School, who has worked in this field for decades, has identified four elements to procedural justice in the justice system:

- Voice: the ability of court participants to participate by expressing their own viewpoints.
- Neutrality: the consistent application of legal principles by unbiased decision makers who are transparent about how the decisions are made.
- Respect: that individuals are treated with courtesy and respect, which includes respect for people's rights.
- Trust: that the decision makers are perceived as sincere and caring, trying to do the right thing.<sup>2</sup>

Perceptions of all of these would be furthered if the public could watch the justices at work.

Transparency itself is important; it lets viewers make their own judgments about the Court's neutrality. It also lets viewers see the justices trying to work through legal issues in a sincere manner, especially when considering some of our country's most difficult legal issues. The public could assess for itself whether the Court's hearing was

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<sup>2</sup> The research in this area is summarized, along with links to other resources, in a bench card for judges, *Procedural Fairness/Procedural Justice: A Benchcard for Trial Judges* (2018), produced by the American Judges Association, the Center for Court Innovation, the National Center for State Courts, and the National Judicial College, available at <https://bit.ly/2liC3c8>.

fair, how difficult the issues might be to decide, and what arguments were the most convincing.

There's a significant contrast between the United States Supreme Court and other high courts in the United States and elsewhere. Most of our state supreme courts live-stream or televise their arguments. The Kansas Supreme Court has done so since 2012, and the archived argument video in each case is linked along with the opinion when it is issued. The United Kingdom's Supreme Court recently allowed live coverage of both the arguments and the decision announcement in its latest Brexit-related case. More than four million viewers were tuned in at some point. They had a chance to hear the arguments on the most important legal issue before their government.

Our Supreme Court had a similar opportunity back in 2012 when it heard the first cases over the Affordable Care Act. The Court set aside three days for oral argument, and the nation's 24-hour news cycle was focused on the cases. But the public had no ability to hear the arguments or even excerpts of them during those news cycles. The public had no chance to see for itself whether the Court had provided fair hearings.

Had the hearings been broadcast, I'd argue that the public's perception of the Court's hearings would have been positive. Minneapolis trial judge Kevin Burke and I

looked at the justices' performance during those oral arguments. On the whole, we found that the justices acted even-handedly and asked appropriate questions of both sides.<sup>3</sup> That was especially true for the two most critical members of the Court, Chief Justice John G. Roberts, Jr., who presided, and Justice Anthony Kennedy, widely regarded then as the key swing vote for most cases on the Court.

Some have argued that live broadcasting may change the proceeding, that either lawyers or the justices will change their behavior. If lawyers do so, the justices have ample power to control it. And if the justices' own behavior is inappropriate in some way (whether because of cameras or in spite of their presence), the public should see that—and hopefully the justices would change that behavior. Judges throughout the United States attend regular training courses about every aspect of their jobs, including how to conduct themselves on the bench and how to regulate the behavior of others in the courtroom. The justices of the United States Supreme Court could surely learn these same lessons if need be.

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<sup>3</sup> For a detailed review of how the justices met expectations for procedural justice during these arguments, see Steve Leben & Kevin Burke, *Supreme Court Gets a Passing Grade on Procedural Fairness—So Far*, Procedural Fairness for Courts and Judges Blog Posting, April 13, 2012, available at <https://bit.ly/2kTkWgz>. Suggestions for how the Supreme Court can project procedural-justice principles when hearing oral arguments are at Steve Leben & Kevin Burke, *Supreme Court Will Be Tested as It Hears Health-Case Arguments*, MINN. POST, March 26, 2012, available at <https://bit.ly/2mS5H8e>.

I had the opportunity as a trial judge to preside over two murder trials that drew broadcast-media attention (including from national networks). I allowed broadcast cameras in the courtroom throughout those trials with no problems for attorneys, witnesses, or jurors. If we can do that in the context of murder trials—and if most of the state supreme courts can do that for their oral arguments—so can the United States Supreme Court.

###



## MICHIGAN SUPREME COURT

BRIDGET M. McCORMACK  
CHIEF JUSTICE

MICHIGAN HALL OF JUSTICE  
925 WEST OTTAWA STREET  
LANSING, MICHIGAN 48915

September 24, 2019

The Honorable Henry C. Johnson  
The Honorable Martha Roby  
U.S. House Committee on the Judiciary  
Subcommittee on Courts, Intellectual Property, and the Internet  
2138 Rayburn House Office Building  
U.S. House of Representatives  
Washington, DC 20515

Dear Representatives:

Sunshine is a powerful thing, especially when it comes to revealing to the public how our government works. In the legislative and executive branches, sunshine leads to better public policy, informed by public input. In the judiciary, sunshine leads to better public understanding and increased trust in judicial decisions. That trust is the bedrock of our democracy; however, blocking broadcast media access to federal courts undermines public trust and thwarts the democratic process.

My view on opening the doors of federal courts to television coverage is simple: It's the public's court. They should be able to watch it work with as little difficulty as possible. My dad watches the Michigan Supreme Court online when we have oral argument; he should be able to do the same with U.S. Supreme Court and every other federal court.

Especially with federal courts of appeal and SCOTUS, people can't easily travel to where the court sits to see it work. But they have a real interest in the court's decisions as those decisions apply to them. Why shouldn't they see how it does business and be able to watch it in action? If you live in Michigan and there is a case being argued in the 6th Circuit the outcome of which will affect you, why should you have to travel to Cincinnati to watch the court conduct business?

More transparency is also important for procedural fairness. When people understand what the court is doing, and understand how it works and how it makes its decisions, and even understands why it makes those decisions, they are more likely to follow them. This openness builds confidence in the rule of law and encourages the public to participate in future proceedings and to follow the court's orders.

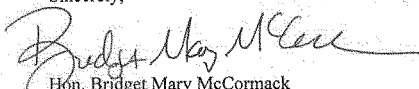


Opposition to broadcast media access relies on tired old maxims that have long been disproven by practice in courts nationwide who have embraced transparency and sunshine over closed doors and darkness. For example, some say TV cameras distract participants. In our courtroom, cameras are simply a fixture of proceedings, no more distracting than a podium or a chair but just as necessary. And some say TV diminishes the dignity of the courts. The opposite is true: blocking public access makes the public wonder what less than dignified things might be happening behind closed doors.

Nearly every state allows some form of camera coverage in the courtroom.<sup>1</sup> While some are more expansive than others, Michigan sets the standard in its court rule<sup>2</sup> which puts the burden on those who oppose a camera in the court to make a compelling case on the record as to why cameras should not be allowed. Such cases might include protecting the identity of a sexual assault victim.

In Michigan, the Supreme Court not only streams our proceedings in real time on our website and makes them available on a YouTube channel after the fact, we Tweet photos of oral arguments, encourage the public to watch, provide links to case summaries, and even provide definitions to obscure legal terms. The feedback from the public and the legal community is universally positive. Viewership is not substantial—maybe a few hundred for a noncontroversial case to a few thousand for cases of intense public interest—but the impact is substantial because the public is assured the sun is shining on the judicial branch. Even if they decide not to watch, they tell us they are grateful that we allow them to choose.

Sincerely,



Hon. Bridget Mary McCormack  
Chief Justice

cc: Honorable Jerrold Nadler, Chair  
Honorable Doug Collins, Ranking Member

<sup>1</sup> [https://www.rtdna.org/content/cameras\\_in\\_court](https://www.rtdna.org/content/cameras_in_court)

<sup>2</sup> A.O. No. 1989-1—Film or Electronic Media Coverage of Court Proceedings

# The Supreme Court of Ohio

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September 23, 2019

United States House Committee on the Judiciary  
The Subcommittee on Courts, Intellectual Property, and the Internet  
Committee Hearing Room  
2141 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Johnson and Ranking Member Roby,

Please accept this letter as my support of video broadcast access in federal courts as you consider testimony during the hearing *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts*. As the Chief Justice of the Supreme Court of Ohio, I have seen firsthand how valuable cameras in the courtroom can be.

The Supreme Court of Ohio began live streaming its oral arguments in 2002. I firmly believe that access to those videos increases public trust and confidence in the court system as it provides anyone, anywhere, with an opportunity to watch those arguments thereby demystifying the work of the Court.

In addition to live streaming oral arguments, these videos are also archived for future use and can be a valuable educational tool. The Court just recently announced a new initiative, *Under Advisement*, in which teachers lead high school students through an in-depth study of an already-decided Ohio Supreme Court case utilizing original materials, including video recordings of oral arguments. This innovative use of those video recordings is meant to strengthen a student's understanding of Ohio's court system. The lesson plans are free and were designed to align with Ohio's Learning Standards for the High School American Government Curriculum.

Furthermore, as you will see from the two enclosed letters to the editor as published by the *Los Angeles Times* and the *Columbus Dispatch*, I have been an advocate for live streaming in courtrooms for a number of years. Live streaming increases trust in judges, in our decisions, and in the rule of law.

It is my hope that the federal courts will follow suit and join many state courts, including the Supreme Court of Ohio, in broadcasting court proceedings. By doing so, the federal government can demonstrate its commitment to transparency and access to justice.

Sincerely,

A handwritten signature in black ink, appearing to read "Maureen O'Connor".

Maureen O'Connor  
Chief Justice

Attachments

## Los Angeles Times

Lights, camera, Supreme Court: It's about time

By MAUREEN O'CONNOR  
DEC. 20, 2013

One of the top federal appeals courts this month took a major step forward in opening the historically opaque federal judicial system to the public by expanding the use of cameras. When will the Supreme Court follow suit and finally allow cameras in its courtroom?

The U.S. 9th Circuit Court of Appeals announced that starting this month it will allow live video streaming of all its *en banc* proceedings — those at which a full panel of judges is present. It has allowed live coverage only in selected cases in the past. Since 1996, federal appeals courts have been allowed to choose for themselves whether to broadcast proceedings, but very few have done so.

In taking this action, the 9th Circuit joins very good company. Every state Supreme Court allows cameras. And in November, Britain — whose legal establishment is so conservative that some judges and attorneys still wear powdered wigs — lifted its 88-year-old ban on cameras in its Court of Appeal. And its highest court began televising cases in 2009.

The U.S. Supreme Court is now one of the last major institutions of Western civilization that has not entered the 21st century technologically. I join with those in a growing movement calling on the justices to change that.

When Justice David H. Souter uttered his now-infamous declaration in 1996 that cameras would roll into the Supreme Court over his dead body, the Internet was relatively new and Facebook, YouTube, Twitter and the iPhone were as real as Capt. Kirk's communicator. Today, there are few facets of daily life that are not available instantly online, including many criminal trials, which you can even watch on your mobile device at 30,000 feet.

What this has done is create an expectation by the public that if something is truly important, it can be witnessed firsthand. Nearly every institution of democratic government has responded. Online access — and particularly video — is routine, whether for local town hall meetings or presidential announcements.

The Supreme Court's oral arguments stand as the lone exception. The court views itself as truly exceptional, fundamentally unique from all other institutions in a way that cameras would somehow spoil.

The problem with this view is that after three decades of other courts using cameras, we don't have to speculate about the effects. In Ohio, we have been broadcasting our cases live on television and the Internet for almost 10 years. The evidence shows that cameras in the courtrooms are a positive experience.

Last month, I spoke at the National Press Club with others from across the political spectrum who would normally find few things to agree on, yet we all agreed that the U.S. Supreme Court should open its proceedings to cameras. We considered the arguments against cameras and found them all wanting.

Some Supreme Court justices have worried that cameras would lead to grandstanding as advocates try to show off for viewers. In my experience, this simply doesn't happen. Attorneys know the only audience they need to convince sits right in front of them, and justices would not allow them to forget that fact. Grandstanding not only fails to help advocates argue their cases, but it may also hurt their stature in the eyes of the court.

The justices of the Supreme Court often claim that they do not want to be public figures. But members of the public have as much right to see them in action as they do their mayors or members of Congress. And privacy concerns do not appear to prevent justices of all ideological stripes from turning to public appearances when promoting one of their books.

Preserving the majesty of the high court is the core of the argument against cameras, but the idea that the court as an institution requires insulation is wrong. Justices express concern that snippets of their discussions might be taken out of context, but that is just as possible in print as it is on video, arguably more so. By not allowing the wider public to see and hear these discussions, the court becomes a more mysterious institution — and not necessarily a more effective one.

One member of the panel at the National Press Club meeting, Kenneth Starr, president of Baylor University and former U.S. solicitor general, joked that, "with all due respect," the Supreme Court justices "are not the Oracle of Delphi telling us what the gods mean."

In recent polls, public confidence in the Supreme Court is near an all-time low. This decline will continue until the Supreme Court operates less like an ancient Greek soothsayer and more like the coequal branch of modern government that it is.

*Maureen O'Connor is chief justice of the Supreme Court of Ohio.*

# The Columbus Dispatch

## **Maureen O'Connor commentary: U.S. Supreme Court should allow cameras**

Posted Apr 6, 2013 at 12:01 AM Updated Apr 7, 2013 at 10:58 AM

As the U.S. Supreme Court heard historic oral arguments same-sex marriage last week, a debate outside the courtroom centered on a timeless question facing the top court in the land: Should the justices respond to public opinion or lag behind as society moves forward?

What we witnessed last week leads me to the inescapable conclusion that the U.S. Supreme Court should catch up with the nation. It is time for the court to allow cameras in its courtroom.

I write not as chief justice of the Supreme Court of Ohio but as a citizen. I have a unique perspective by virtue of my experience as a justice on a televised Supreme Court.

Regardless of one's views on same-sex marriage, this week offered a spectacle of vivid images demonstrating that the justices are lost in the 19th century when it comes to being open and transparent to the public they serve. Rather than seeing lawyers in action before the justices, we saw citizens huddled in the cold for days, waiting for a ticket to have the privilege to watch our democratic system of justice in action. There are more than 300 million Americans, but only 500 seats in the Supreme Court gallery.

For most of us, after two days of arguments, we only have access to almost comical courtroom sketches of the proceedings rather than video or even still photographs. We are left with talking heads speculating on what they did not personally observe. These images serve no purpose but to further erode the public image of the court.

Late last year, public confidence in the Supreme Court reached its lowest point in 25 years. In one poll by *The New York Times* and CBS News, only 44 percent of Americans said they approved of the job of the court. About 75 percent said they believe the court's decisions are influenced by politics.

In this Information Age -- when you can post a video of your child's piano recital, and his grandparents "like" it on Facebook before he has finished playing -- the public's expectations about how they acquire knowledge and understand the world have undergone a radical metamorphosis. The impact of video and audio has no equal, and absent really being there, there is no substitute.

The tired old arguments against allowing cameras in the courtroom are approaching flat-Earth status. They fall into one of four categories:

1. *Justices, counsel or observers will grandstand for the cameras.* Like many of our counterparts across the nation, the Ohio Supreme Court broadcasts its oral arguments live, in our case for almost 10 years. Initial speculation of grandstanding has proved unfounded. Our archived video, coupled with online access to briefs and opinions, represents a superior learning tool that has been utilized thousands upon thousands of times.
2. *Allowing cameras detracts from the majesty and decorum of the proceedings.* To the contrary, cartoonish courtroom sketches detract from the proceedings, and as already noted, the public today distrusts what it cannot observe. Technology has advanced to where the cameras are wall-mounted and unobtrusive. The presence of a camera operator is unnecessary, and there is no distraction.
3. *Things will be taken out of context, and the general public won't understand the nuance and complexity of the legal argumentation.* This one is the worst because it is elitist and insulting to the public. The inevitable result of this attitude is that the public is forced to process its information about the court through the filter of the media because there is no direct option available. This is a democracy. We settled the question of whether we trust the people to govern themselves 230 years ago.
4. *The justices are reluctant to become public figures.* Justices are not “ivory-towered,” nor should they be. Justices write and promote their books; they lecture and often participate in teaching events and interviews. The American people are as entitled to know who sits on the Supreme Court as they are entitled to know their local council member or mayor. And they are entitled to see them in action.

The court is to be commended for allowing same-day audio recording of certain big arguments, and select federal lower courts have been experimenting with recorded video. However, the day will come when all U.S. Supreme Court cases are broadcast live in their entirety.

When it does, people will look back on this era the way we do today on the days when ladies were not allowed on the floor of Congress.

The times, they are a’changing. It’s time for the U.S. Supreme Court to catch up.

*Maureen O'Connor is chief justice of the Ohio Supreme Court.*



**Supreme Court of Appeals**  
Charleston, West Virginia

**Elizabeth D. Walker**  
Chief Justice

September 25, 2019

Chairman Henry C. Johnson, Jr.  
Ranking Member Martha Roby  
United States House of Representatives  
Subcommittee on Courts, Intellectual Property, and the Internet  
*Sent Via Electronic Mail*

Dear Chairman Johnson and Ranking Member Roby:

As your Subcommittee considers measures that would expand broadcast access to federal courts, I write as the Chief Justice of a state supreme court that offers live video streaming of its proceedings to express my support for these measures.

The Supreme Court of Appeals of West Virginia is the sole appellate court in our State. We hear appeals from all state courts and administrative agencies as a matter of right. I am proud that our Court was one of the first appellate courts in the country to live stream oral arguments. Since 2001, members of the public have been able to watch video of our oral arguments live. For at least 15 years prior to that (since the 1980s), folks could listen to live audio of the arguments simply by calling a telephone number. I am not aware of any negative consequences of this access during these past 30 years.

There are many benefits to our live streaming, which is currently available on the West Virginia Judiciary YouTube Channel. The transparency made possible by modern technology makes our courts accessible to citizens no matter where they are. Live streaming also enables the public to see our proceedings in real time and demonstrates our commitment to accountability to the rule of law. And, our broadcasts are used regularly in classrooms across West Virginia to educate students about how our state courts work.

Ultimately, transparency increases public confidence in the integrity of our courts. I look forward to your Subcommittee's continued work in this critical area and hope that it brings together bipartisan support.

Sincerely,



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BEFORE THE  
HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON COURTS, IP AND THE INTERNET

WASHINGTON, D.C.

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HEARING ON THE FEDERAL JUDICIARY IN THE 21<sup>ST</sup> CENTURY:  
ENSURING THE PUBLIC'S RIGHT OF ACCESS TO THE COURTS

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COMMENTS OF THE  
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA)

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MICKEY H. OSTERREICHER, GENERAL COUNSEL  
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September 24, 2019

Subcommittee on Courts, Intellectual Property and the Internet  
Committee on the Judiciary  
United States House of Representatives  
116<sup>th</sup> Congress, 2<sup>nd</sup> Session

**Hearing On**  
**The Federal Judiciary in the 21<sup>st</sup> Century:**  
**Ensuring the Public's Right of Access to the Courts**

Testimony of Mickey H. Osterreicher  
General Counsel, National Press Photographers Association (NPPA)

September 24, 2019

The National Press Photographers Association (NPPA) greatly appreciates the opportunity to submit comments in advance of the subcommittee hearing on “the Federal Judiciary in the 21<sup>st</sup> Century: Ensuring the Public’s Right of Access to the Courts.”

**Background**

The NPPA is the “Voice of Visual Journalists.” Founded in 1946, it is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. Our members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

Additionally, the NPPA is a member of the Coalition for Court Transparency, a national non-partisan alliance that advocates for greater openness and transparency from the federal courts system, including the U.S. Supreme Court.

As way of background I am an award-winning visual journalist with almost forty years' experience in print and broadcast. My work has appeared in such publications as the New York Times, Time, Newsweek and USA Today as well as on ABC World News Tonight, Nightline, Good Morning America, NBC Nightly News and ESPN.

During that career I have covered hundreds of court cases from the Attica trials, where I had the opportunity to watch the late William Kunstler and Ramsay Clark defend their clients, to the murder trial of O.J. Simpson. I was actively involved in the 10-year experiment (1987 -1997) under New York Judicial Law § 218, entitled "Electronic Coverage of Judicial Proceedings."<sup>1</sup> And by electronic, I mean audio-visual and audio recordings as well as still images.

#### **Day has long since passed and yet . . .**

In 1965 for the first time, the U.S. Supreme Court heard a case dealing with the televising and broadcasting of a trial. In the opinion, Justice Harlan predicted that "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."<sup>2</sup> Fifty-four years later, there can be no real argument that day has long since passed . . . and yet meaningful electronic coverage of the federal courts, including the U.S. Supreme Court is still aspirational at best despite the exponential advancement of technology and the widespread reliance on electronic coverage and social media to disseminate news and information.

<sup>1</sup> See: <http://codes.lp.findlaw.com/nycode/JUD/7-A/218>

<sup>2</sup> *Estes v. Texas*, 381 U.S. 532, 595-596 (1965).

At the outset, it should be noted that under Federal Rule of Criminal Procedure 53, adopted in 1946, electronic media coverage of criminal proceedings in federal courts has been expressly prohibited. Rule 53 states: "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."<sup>3</sup>

The Judicial Conference of the United States extended that prohibition "against "broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto" to civil proceedings as well in 1972.<sup>4</sup>

In 1990 following the advice of its Ad Hoc Committee on Cameras in the Courtroom (appointed by Chief Justice Rehnquist in 1988), the Judicial Conference of the United States<sup>5</sup> commenced a three-year (July 1, 1991 to June 30, 1993) pilot program permitting "the broadcasting, televising, electronic recording, or photographing of courtroom proceedings by the media" in civil cases in six district and two appellate courts.<sup>6</sup> At the conclusion of the experiment in 1994, the Court Administration and Case Management (CACM) Committee presented a report and recommendation to the Judicial Conference, which included an evaluation of the pilot program by the Federal Judicial Center (FJC).<sup>7</sup> The report also included an analysis of studies conducted in state courts regarding electronic coverage.

After reviewing the FJC Report, the "Committee was confident that the experimental media coverage did not create sufficient disruption to civil proceedings to warrant the continuation of the

<sup>3</sup> Rule 53. Courtroom Photographing and Broadcasting Prohibited [https://www.law.cornell.edu/rules/frcrmp/rule\\_53](https://www.law.cornell.edu/rules/frcrmp/rule_53)

<sup>4</sup> See: <https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2006/shuttered-justice/>

<sup>5</sup> The Judicial Conference of the United States is the rulemaking body for the entire federal court system, with the exception of the United States Supreme Court. See 28 U.S.C. § 331.

<sup>6</sup> Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals (1994)) <http://fjp.resource.org/courts.gov/fjc/elecmediacov.pdf>

<sup>7</sup> See U.S. JUD. CONF., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 46-47 (1994), available at <http://www.uscourts.gov/judconf/94-Sep.pdf>

prohibition against such coverage.<sup>8</sup> In a supplemental report the FJC once again stated that “most jurors and witnesses believe electronic media presence has no or minimal detrimental effects on witnesses and jurors, while a minority believe there are detrimental effects on them.”<sup>9</sup> Based upon these evaluations, the Committee recommended that the Judicial Conference allow electronic coverage of civil proceedings in accordance with the Conference’s policy and standards.

And yet the Judicial Conference chose to disregard those favorable assessments, data and recommendations, by dismissively stating, “the intimidating effect of cameras on some witnesses and jurors was cause for concern.”<sup>10</sup> Based on this reasoning, the Conference declined to approve the Committee’s recommendation to continue such coverage of civil proceedings<sup>11</sup> and the initial pilot program ended on December 31, 1994.<sup>12</sup>

Despite that setback a number of progressive district court judges defied what they considered to be only the persuasive position of the Judicial Conference on this issue.<sup>13</sup> In 1996 New York District Court Judge Robert W. Sweet permitted electronic coverage<sup>14</sup> under the “presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to

<sup>8</sup> U.S. JUD. CONF., COMM. ON CT. ADMIN. & CASE MGMT., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 3 (Sept. 1994).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> U.S. JUD. CONF. RPT. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S., 47 (Sept. 1994), available at <http://www.uscourts.gov/judconf/94-Sep.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> These cases were *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580 (S.D.N.Y. 1996); *Marisol A. v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996); *Sigmon v. Parker Chapin Flanau & Kimpl*, 937 F. Supp. 335 (S.D.N.Y. 1996); and *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).

<sup>14</sup> *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 583 (S.D.N.Y. 1996). The rule provided that “No one other than court officials engaged in the conduct of court business shall bring any camera, transmitter, receiver, portable telephone or recording device into any courthouse or its environs without written permission of a judge of that court.” *Id.* (quoting S.D.N.Y. Gen.R. 7). Judge Sweet read this language to allow camera coverage, writing that, “Although Rule 7 does not state in the affirmative that court proceedings may be televised, it plainly permits cameras in the courtroom with a judge’s written permission.” *Id.* at 584.

view those proceedings on television.”<sup>15</sup> He also took judicial notice that “the equipment [was] no more distracting in appearance than reporters with notebooks or artists with sketch pads.”<sup>16</sup>

In that same year Senior District Judge Jack B. Weinstein also allowed coverage while finding that “actually seeing and hearing court proceedings, combined with commentary of informed members of the press and academia, provides a powerful device for monitoring the courts.”<sup>17</sup>

And yet in 2000 during the 106<sup>th</sup> Congress, the Judicial Conference voiced its opposition to electronic media coverage of federal court proceedings. In twenty-two pages of testimony before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, Chief Judge Edward R. Becker (3<sup>rd</sup> Cir.) “strongly opposed”<sup>18</sup> the legislation and the concept. Despite the previous positive findings of the CACM Committee and the Federal Judicial Center, he reiterated the Judicial Conference’s belief “that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process.”<sup>19</sup>

And yet for over twenty years senators and congressmen have been proposing a bill known as the since “Sunshine in the Courtroom Act” which would authorize the presiding judge of a federal appellate district court to “at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides.”<sup>20</sup> The latest in this long list of fruitless proposals is the Sunshine in the Courtroom Act of 2019, which would establish a framework to allow federal court proceedings—in district courts, in circuit courts, and at the Supreme Court—to be photographed, recorded, broadcast, or televised.”<sup>21</sup>

<sup>15</sup> *Id.* at 589. Judge Sweet also noted that “[t]he equipment [used] is no more distracting in appearance than reporters with notebooks or artists with sketch pads.” *Id.* at 582.

<sup>16</sup> *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).

<sup>17</sup> *Id.* at 138.

<sup>18</sup> Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States, at 1 (2000)

<sup>19</sup> *Id.*

<sup>20</sup> See: <https://www.govtrack.us/congress/bills/113/hr917/text>

<sup>21</sup> See: <https://www.congress.gov/bills/116th-congress/senate-bill/770>

**And the beat goes on . . .**

In 2010 the Judicial Conference authorized a second Cameras in the Courtroom Pilot Project, to last up to three years.<sup>22</sup> Once again the pilot was to “evaluate the effect of cameras in district court courtrooms, of video recordings of proceedings therein, and of publication of such video recordings,”<sup>23</sup> with the Federal Judicial Center once again studying the effects of the program.<sup>24</sup>

In 2011 the selection of fourteen (14) federal trial courts that had voluntarily agreed to take part in the pilot was announced.<sup>25</sup> The announcement stressed that the judges volunteering for the pilot must follow already adopted guidelines that among other things stated that “pilot recordings will not be simulcast, but will be made available as soon as possible on the US Courts and local participating court websites at the court’s discretion.”<sup>26</sup> Only those participating courts “may record court proceedings for the purpose of public release,”<sup>27</sup> with the presiding judge making the case selection which also required the consent of all parties “of each proceeding in a case”<sup>28</sup>

This time it would be court personnel and not the media operating the equipment used to record the selected proceedings, with the presiding judge having the ability to instantly stop a recording if necessary. It is entirely up to the judge which cases are recorded, and according to the guidelines “it is not intended that a grant or denial . . . be subject to appellate review.”<sup>29</sup> Recordings by any other entities or persons have been prohibited. The guidelines also recommended three to four

<sup>22</sup> See U.S. JUD. CONF., REPORT OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S. (Sept. 14, 2010), at 11-12, *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2010-09.pdf>. See also U.S. JUD. CONF., JUDICIARY APPROVES PILOT PROJECT FOR CAMERAS IN DISTRICT COURTS (press release), Sept. 14, 2010, *available at* <http://www.uscourts.gov/News/NewsView/10-09-14/JudiciaryApprovesPilotProjectforCamerasinDistrictCourts.aspx>.

<sup>23</sup> REPORT OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S. (Sept. 14, 2010), *supra*, at 11.

<sup>24</sup> *Id.* at 12.

<sup>25</sup> See: <http://www.uscourts.gov/News/NewsView/11-06-08/CourtsSelectedforFederalCamerasinCourtPilotStudy.aspx>

<sup>26</sup> *Id.*

<sup>27</sup> See: <http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf>

<sup>28</sup> *Id.* at 2

<sup>29</sup> *Id.* at 1

inconspicuously fix-placed cameras focused “on the judge, the witness, the lawyers’ podium, and/or counsel tables,”<sup>30</sup> along with “a feed from the electronic evidence presentation system.”<sup>31</sup> Additionally “the recording equipment should transmit the camera inputs to a switcher that incorporates them onto one screen.”<sup>32</sup> Unfortunately it was also stated at the outset of the pilot that funding for equipment or technical support would be limited and the courts were discouraged “from purchasing new equipment.”<sup>33</sup>

In 2016 “the Judicial Conference received the report of its Committee on CACM, which agreed not to recommend any changes to the Conference policy at that time. the Ninth Circuit Judicial Council, in cooperation with the Judicial Conference authorized the three districts in the Ninth Circuit that participated in the cameras pilot (California Northern, Washington Western, and Guam) to continue the pilot program under the same terms and conditions to provide longer term data and information to CACM.”<sup>34</sup>

Currently, in federal trial courts, “a judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only: 1) for the presentation of evidence; 2) for the perpetuation of the record of the proceedings; 3) for security purposes; 4) for other purposes of judicial administration; 5) for the photographing, recording, or broadcasting of appellate arguments; or 6) in accordance with pilot programs approved by the Judicial Conference.”<sup>35</sup> When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is

<sup>30</sup> *Id.* at 3

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See: <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts>

<sup>35</sup> *Id.*



permitted, a judge should ensure that it is done in a manner that will: 1) be consistent with the rights of the parties, 2) not unduly distract participants in the proceeding, and 3) not otherwise interfere with the administration of justice.”<sup>36</sup>

#### Limitations

Because live or slightly delayed electronic coverage is not allowed, not only is the media prohibited from providing electronic coverage they are also precluded from getting a feed of those proceedings from court personnel. The guidelines specifically state, “The media or its representatives will not be permitted to create recordings of courtroom proceedings”<sup>37</sup>. For example, in *EMC Hightower v. City and County of San Francisco*,<sup>38</sup> from the Northern District of California, the judge in the video opens the hearing by mentioning the cameras pilot project, and then articulates the rules, which in effect make the video unavailable to the public (and the press) until after the video has been reviewed by him. Under those rules the public and the press are only able to acquire the video by download from the court’s website once the recordings are posted. It is this absolute control of such electronic coverage which limits meaningful public access.

For the most part courtroom proceedings, especially in civil cases, do not make for compelling viewing and are more like watching paint dry. Recording in such a way that it appears like one is watching the simultaneous output from four surveillance cameras on one screen rather than an important court proceeding does not improve things. After viewing some of the recorded proceedings I observed that often nothing is happening in one or more sectors of the screen while the person speaking in another sector is either out of focus or has his body halfway off the edge of the frame. At the very least this could be easily remedied by having professionally trained personnel operate the

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 5.

<sup>38</sup> See: <http://www.uscourts.gov/Multimedia/Cameras/NorthernDistrictofCalifornia.aspx>

equipment rather than it being fixed with no ability to focus, pan, tilt, zoom or appropriately frame a shot. As recorded, many of these cases are unsuitable for broadcast and too tedious to view.

#### **Meaningful Access and Electronic Coverage of Court Proceedings**

Aside from the aesthetics of electronic coverage is the constitutional principle that courts are meant to be “open.” It is instructive to remember the words of Justice Stewart in his dissent in *Estes* where he admonished that “it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, *I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.*”<sup>39</sup>

Just as the Supreme Court articulated an evolving standard of decency in capital punishment cases, there should also be an evolving standard of openness and meaningful access when it comes to electronic coverage of federal court proceedings. In *Richmond Newspapers, Inc. v. Virginia*<sup>40</sup> the Court held that under the First Amendment the public, including the press, had a right of access to a criminal trial, because such proceedings had traditionally been open to the public. “What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe,”<sup>41</sup> Chief Justice Burger wrote in the plurality opinion.

In 2019 most information regarding court proceedings comes from broadcast television, cable/satellite programming and Internet content, including electronic material and social media on websites provided by once traditional print media. Thus, the ability of the press to disseminate information via electronic coverage of court proceedings is a critical component in affording the public the modern equivalent of attending and observing. As Chief Justice Burger explained further, “people in an open society do not demand infallibility from their institutions, but it is difficult for them to

<sup>39</sup> *Id.* at 603-04 (Stewart, J., dissenting) (emphasis added).

<sup>40</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>41</sup> *Id.* at 564 (plurality opinion of Burger, C.J.).

accept what they are prohibited from observing.”<sup>42</sup> Justice Stewart, concurring in the judgment, wrote that “the right to speak implies a freedom to listen,” and that “the right to publish implies a freedom to gather information.”<sup>43</sup> Similarly, that right should apply to electronic coverage of court proceedings.

More than a quarter-century ago, the lone dissent in *US v. Hastings*<sup>44</sup> (an 11<sup>th</sup> Circuit case regarding electronic trial coverage) wrote “The institutional interests cited in support of the restriction [on electronic coverage of courtroom proceedings] are, at best, mere commendations for the ideals our judicial system strives to maintain. At worst, they represent pretexts for an abhorrence to change and ignore the advances of modern-day technology. When suitably circumscribed by appropriate and detailed standards, the public interests which favor electronic media coverage far outweigh the honestly perceived but unsubstantiated concerns over a possible lessening of courtroom decorum and fairness.”<sup>45</sup>

Opening courts to electronic coverage is essential for the public to have meaningful access to court proceedings, to see that justice is being done, to be assured of the integrity of the process, and to better understand how decisions are made at both the trial and appellate levels, especially those of the Supreme Court.

The Framers envisioned court as being part of the public square, a place in an emerging nation where anyone could stop in to observe the proceedings and be assured of the integrity of our system of justice. Given the complexity of our society and the size of our communities, that’s just no longer possible. But the core need for true openness and meaningful access is more important than ever, particularly as our courts have become national in scope and central agents of either change or

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<sup>42</sup> *Id.* at 572.

<sup>43</sup> *Id.* at 599 (Stewart, J., concurring in the judgment, citing *Branzburg v. Hayes*, 408 U.S. 665, 681).

<sup>44</sup> *US v. Hastings*, 695 F.2d 1278 (11th Cir. 1983).

<sup>45</sup> *Id.* at 561 (citing *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 775 (Fla. 1979)).

maintaining the status quo in matters as significant as who will be president, whether health-care reform is constitutional, and who will have the right to marry.

The true openness foreseen by the Framers is closer in nature to that provided by electronic coverage of court proceedings than by second-hand reporting. The only way that the public at large can have full faith in the decisions of our courts is to have meaningful access by being able to see and hear the proceedings firsthand, and the only way they can do so is to permit electronic coverage of the courts directly to the public.

#### **U.S. Supreme Court**

Being admitted to the Supreme Court bar and having submitted amicus briefs in many cases I am always both in awe and disbelief that I am only one of about three hundred people in that austere courtroom who gets to see and hear the arguments.

As the Justices take up issues of great import, it's clear that Americans' interest in the court's work is only increasing. But there's a real problem. Millions of Americans, who do not have the time or money to travel to Washington, D.C., to stand in line for hours to get one of the hundred or so coveted seats inside the building on argument day, are unable to experience the very openness and meaningful access espoused by the High Court itself – even though modern technology affords the opportunity to do just that.

Every state supreme court in the country has a more open technology policy than that of the U.S. Supreme Court. Former federal judge and solicitor general Ken Starr has said: "There is no reason the public should be denied access to consideration of urgent [legal] questions – from global warming to health care – that affect us all. Cameras in the courtroom of the Supreme Court are long overdue."<sup>46</sup>

<sup>46</sup> See: [http://www.nytimes.com/2011/10/03/opinion/open-up-high-court-to-cameras.html?\\_r=0](http://www.nytimes.com/2011/10/03/opinion/open-up-high-court-to-cameras.html?_r=0)

Ohio Supreme Court Chief Justice Maureen O'Connor agrees, saying: "An absolutely necessary condition of openness and accessibility in this new era [of transparency] is allowing video cameras"<sup>47</sup> in public courts. Former U.S. Attorney General Richard Thornburgh, once a proponent of the ban on electronic coverage, said twenty years ago that he "changed his views and now supports the televising of criminal proceedings."<sup>48</sup> He also stated that he was "amazed at the number of people, not lawyers, picking up on the intricacies of our system and realizing that this Bill of Rights is for everybody."<sup>49</sup>

The Justices claim that cameras will lead to grandstanding during oral arguments. Experience in state supreme courts and other federal courts of appeal suggest otherwise. Advocates before the court are professionals – and they know the only audience they need to convince is the nine justices themselves.

The Justices have also expressed concerns about their personal privacy. This does not conform to their obligations as public figures. Citizens can watch, via electronic coverage, their local town council or Congress in action; the Supreme Court should not conduct itself differently. Justices do not hesitate to provide interviews when they have a book to promote and often appear at speaking events across the country in full view of electronic coverage. As a stark divide between the Justices intransigence on this subject and "the people's business"<sup>50</sup> is a C-Span poll that showed 91 percent of adults thought the Supreme Court should be more open, while 64 percent indicated that agree that "the U.S. Supreme Court should allow television coverage of its oral arguments" while 23 percent disagreed.<sup>51</sup>

<sup>47</sup> See: <http://www.c-span.org/video/?293580-1/supreme-court>.

<sup>48</sup> Memorandum of Points and Authorities of Court TV in Opposition to Termination of Film and Electronic Coverage, *People v. Simpson*, No.BA097211, 1994 WL 621389 at \*12 (Cal. Super. Ct. Nov. 7, 1994).

<sup>49</sup> *Id.*

<sup>50</sup> See: <http://www.nationallawjournal.com/supremecourtbrief?id=1202676220755/As-Judiciary-Chair-Grassley-Likely-to-Push-for-Cameras-in-Supreme-Court?slreturn=20141101072759>

<sup>51</sup> See: <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%2008%2028%2018.pdf>.

### Public Proceedings

Justice Holmes took judicial notice of the “vast importance” of the “public trial” phenomenon when he wrote about, “the security which publicity gives for the proper administration of justice.” Holmes continued that “[i]t is desirable that the trial of [civil] causes should take place under the public eye.”<sup>52</sup> This public scrutiny was deemed crucial “because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with *his own eyes* as to the mode in which a public duty is performed.”<sup>53</sup> In 2019 electronic coverage continues to be the unblinking eye of the public and to deny its unrivaled potential to convey information instantly and to the widest audience is to deny reality as well as meaningful access to the courts.

Federal courts should not be viewed with suspicion and distrust. Instead they should be governed by the words of Chief Justice Burger when delivering the opinion of the Court in *Nebraska Press Association v. Stewart*: “the value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the acceptance of fairness so essential to public confidence in the system.”<sup>54</sup>

Such electronic coverage provides modern society with almost all its current information. In order to provide meaningful access to federal courts, electronic coverage of its proceedings must be permitted so that the public may see the fair administration of justice for itself.

<sup>52</sup> *Publicker Industry v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984) *citing* 3 W. Blackstone, Commentaries 373) *quoting* *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884))(emphasis added).

<sup>53</sup> *Id.* emphasis added.

<sup>54</sup> *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

To that end the right to receive information under the First Amendment must be permitted. Meaningful access through electronic coverage of proceedings will better help the public by presenting to them the sights and sounds of things, places and people which they would not ordinarily be able to see or hear. The First Amendment is predicated on the belief that an informed society will remain just and free. It will take courage and vision for this doctrine to endure and dynamically continue to evolve as one of the fundamental principles upon which this country was founded.

As Justice Brandeis noted in his dissent in a 1932 due process case, “to stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. But in the exercise of this high power, *we must be ever on our guard, lest we erect our prejudices into legal principles.*”<sup>55</sup>

The federal judiciary must be mindful of its high power not to erect its own prejudices into judicial rules. Society can ill afford to let the arbitrary and speculative objections of jurists antagonistic to the electronic coverage of court proceedings to substantially undermine a fundamental constitutional right by lens-capping the very tools used and increasingly relied upon by the public and eviscerating the very means by which most Americans receive their news.

Justice Holmes also stated “it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>56</sup>

In light of current broadband transmission and storage capabilities to present gavel-to-gavel electronic coverage of court proceedings on the Internet, whether through live streaming or archived

<sup>55</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311(1932)(Brandeis, J., dissenting)(footnote omitted)(emphasis added).

<sup>56</sup> Vol. 3 OLIVER W. HOLMES, *The Path of the Law*, in *Collected works of Justice Holmes* 391, 399 (Sheldon M. Novick ed., University of Chicago Press 1995) (1897).

files, along with the ability to watch such coverage on hand-held devices, makes the quaint notion of citizens gathered around in living rooms to watch live TV on small black & white screens just as passé.

In an age when it is no longer practical for all members of the community to pack into the courthouse and personally take in “court day,” the electronic coverage of court proceedings to a vast public audience and enables the public to satisfy its civic duty in monitoring the government through meaningful access.

### **Conclusion**

The benefits of allowing electronic coverage are numerous and significant: it will bring transparency to the federal judicial system, provide increased accountability from litigants, judges, and the press, and educate citizens about the judicial process. Electronic coverage will allow the public to ensure that proceedings are conducted fairly, and, by extension, that government systems are working correctly. We expect that the watchful eye of the public will demand increased accountability from all courtroom actors, each of whom may feel an increased responsibility to conduct themselves in a manner appropriate to their role, thereby diminishing the risk of rogue actors and other wayward judicial actions potentially harmful to the interests of justice. The non-electronic press, for its part, will also feel the weight of increased accountability, as it will no longer be the only source of information about the courts, and claims of sensationalistic or inaccurate reporting will be readily verifiable by a public able to view the underlying proceedings for itself.

Although some critics of electronic coverage have asserted that it will likely impede the fair administration of justice or cause irreparable harm, empirical studies of these concerns have proved to be speculative at best. Critics have argued against electronic coverage on numerous grounds: because they claim that cameras and other hardware are disruptive of trials, that increased public scrutiny frequently leads to grandstanding and lawyers “trying their case in the press,” and that the



sensationalistic nature of electronic coverage will infringe upon the privacy of participants and create public misperceptions about the judiciary. Each of these concerns, however, has either been specifically refuted by prior experiments with, and studies of, electronic coverage in the courts, or can be expressly addressed by enacting intrinsic safeguards to complement judicial trial court discretion.

The ability of the public to view actual courtroom proceedings should not be trivialized. It touches on a fundamental right, which goes well beyond the mere satisfaction of a viewer's curiosity. That right, advanced by electronic coverage, is the right of the people to monitor the official functions of their government, including that of the judicial system. Nothing is more basic to the democratic system of governance than this right of the people to know how government is functioning on their behalf.

The Internet has enabled gavel-to-gavel electronic coverage of courtroom proceedings because of its intrinsic capacity to permit unlimited content rather than be bound by the time constraints of traditional broadcast and cable media. Additionally, newspaper websites have made it possible for the print media to also provide electronic coverage where they previously were relegated to artist's renderings, still images and written words. Websites carrying news and information have the capacity to convey and archive video of full trial proceedings. A growing trend of many communities to have all-news cable television stations that focus around the clock on local events also would permit extended coverage of federal court proceedings – not just short stories with sound bites.

Finally, modern technology has long since transcended the difficulties that led to bans on such coverage. There are no more whirling, noisy cameras. There are no more glaring lights. Nor does a thundering herd of technicians have to go in and out of the courtroom to set up and tear down their gear. Modern equipment is extremely compact, inaudible, requires no flashes or extra lights, and can be operated remotely by a limited number of trained professionals.

And while courtroom artists have greatly contributed to the coverage of courtroom proceedings in the absence of cameras, for the public to be relegated to viewing something more akin to cave drawings in an age of high-definition television could not be more anachronistic.

In 1996, the Judicial Conference recognized that “technology that permits the reproduction of sound and visual images provides our courts with a valuable resource to assist in their efforts to improve the administration of justice. That resource should be utilized, however, for purposes and in a manner consistent with the nature and objective of the judicial process.”<sup>57</sup>

One would hope that by 2019, after a number of pilot experiments, the federal judiciary will finally acknowledge that those concepts are not mutually exclusive and permit electronic coverage in all courtrooms for all proceedings on a permanent basis. As Chief Justice John Roberts jokingly acknowledged during his confirmation hearings in 2005 “television cameras are nothing to be afraid of.”<sup>58</sup>

Justice Stewart also took note of electronic coverage by stating, “the suggestion that there are limits upon the public’s right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms.”<sup>59</sup>

Thank you for the opportunity to submit these comments. We look forward to working with this Subcommittee and the full Judiciary Committee in helping to create more meaningful access to federal courts, including the U.S. Supreme through electronic coverage of court proceedings.

<sup>57</sup> See: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR1993-04.pdf> at 284.

<sup>58</sup> Transcript: Day Three of the Roberts Confirmation Hearings. See: <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html>

<sup>59</sup> *Estes*, at 614-615 (Stewart, J., dissenting).

Respectfully submitted,

Mickey H. Osterreicher  
General Counsel

September 24, 2019



**AMERICANS FOR  
PROSPERITY.**

September 23, 2019

Subcommittee Chair Hank Johnson and Ranking Member Martha Roby:

On behalf of millions of Americans for Prosperity activists across 35 states, I thank you for holding this important hearing today on government transparency in the federal courts. AFP supports H.R. 1164, the Electronic Court Records Reform Act, which modernizes the Public Access to Court Electronic Records System (PACER) and enhances the public's ability to review court decisions by making access to PACER free to all.

The Judicial Conference of the United States deployed PACER in 1988. Since its implementation, PACER has become the dominant method for the public to access federal court documents. It allows anyone who has an online account with the service to search and access all federal court documents – with some reasonable restrictions – with specific selection terms.

Currently, it costs ten cents per page for an individual to search for court documents through PACER. When PACER was originally implemented, this fee may have been commensurate with database maintenance and storage costs but that is no longer the case. The Administrative Office of the United States Courts, which oversees PACER, receives almost 150 million dollars per year from PACER fees – far more than necessary to maintain the current system.

The ECRRA modernizes PACER so it can fulfill its transparency goals. The bill requires that the more than 300 million court documents available on PACER be made available to the public free of charge. It also increases accessibility by requiring that documents be text-searchable and machine-readable. The ECRRA also maintains the privacy of litigants involved in sensitive cases by mandating redactions where appropriate.

At AFP, we believe that the right to easily access public information is essential to a democratic society, which is why we've supported multiple bills in the 116<sup>th</sup> Congress that enhance government transparency. More access to information about the government empowers people to engage on issues they care about and hold those in power accountable. For instance, it empowers journalists to seek out and find information on important federal cases and inform the public about new developments.

For those reasons, we support H.R. 1164, the Electronic Court Records Reform Act. We respectfully ask that the House Judiciary Committee pass the bill so it can be considered on the House floor.

Through broad-based grassroots outreach, Americans for Prosperity (AFP) is driving long-term solutions to the country's biggest problems. AFP activists engage friends and neighbors on key issues and encourage them to take an active role in building a culture of mutual benefit, where people succeed by helping one another. AFP recruits and unites activists in 35 states behind a common goal of advancing policies that will help people improve their lives.

Sincerely,

Brent Gardner  
Chief Government Affairs Officer  
Americans for Prosperity

Through broad-based grassroots outreach, *Americans for Prosperity (AFP)* is driving long-term solutions to the country's biggest problems. AFP activists engage friends and neighbors on key issues and encourage them to take an active role in building a culture of mutual benefit, where people succeed by helping one another. AFP recruits and unites activists in 35 states behind a common goal of advancing policies that will help people improve their lives.



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**Statement of Michelle Cosby  
President of the American Association of Law Libraries  
For the Hearing Record**

**"The Federal Judiciary in the 21st Century: Ensuring the Public's Right of  
Access to the Courts"**

**Hearing before the U.S. House of Representatives Judiciary Committee  
Subcommittee on Courts, Intellectual Property, and the Internet**

**September 26, 2019**

Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee:

On behalf of the American Association of Law Libraries (AALL), a national organization representing almost 4,000 law librarians and legal information professionals, I submit this statement for the record in support of the Electronic Court Records Reform Act (ECRRA), H.R. 1164. ECRRA modernizes the federal judicial records system and eliminates the paywall that restricts access to court records through the Public Access to Court Electronic Records (PACER) system.

The public's right of meaningful access to judicial proceedings can be traced to a time preceding the First Amendment. The Supreme Court of the United States first recognized its constitutional roots in a landmark 1980 decision, *Richmond Newspapers, Inc. v. Virginia*.<sup>1</sup> The Judicial Conference of the United States authorized a program for electronic public access to court information more than 30 years ago.<sup>2</sup> Soon after, the Federal Judicial Center initiated pilot programs in several bankruptcy and district courts, establishing the early origins of the PACER system.

Unfortunately, despite significant investments in the system during the past three decades, PACER has not kept up with its promise to provide the public with affordable electronic access to court information. Today, PACER is cumbersome, inefficient, and outdated. The system erects barriers to equitable access to information and inhibits access to justice.

PACER charges users 10 cents per page to search for and view electronic documents. From 2010 to 2016, the Administrative Office of the United States Courts (AOUSC) collected more than \$920 million in PACER fees; approximately \$200 million in fees

<sup>1</sup> 448 U.S. 555, 567 (1980).

<sup>2</sup> Rep. of Proceedings of the Jud. Conf. of the U.S. at 83 (Sept. 18, 1988).



collected during that period were recently ruled in violation of the *E-Government Act of 2002*.<sup>3</sup>

PACER fees hinder law librarians' ability to fulfill their responsibility to provide equitable and permanent public access to legal materials and support access to justice. Because PACER charges for access, most law libraries keep their PACER passwords confidential to limit overuse of the library's account. In addition, most academic and public law libraries require users to request access to PACER documents from a librarian or limit assistance to helping users set up their own personal accounts.<sup>4</sup>

During the past two decades, AALL has urged the Judiciary to provide greater access to court records through PACER. In the early 2000s, the Association worked closely with then-Senator Joseph I. Lieberman to draft language included in the *E-Government Act of 2002* to direct the Judicial Conference to charge fees "only to the extent necessary." In 2006, the AALL Executive Board approved a Resolution on No-Fee Federal Depository Library Program (FDLP) Access to PACER, which helped motivate the U.S. Government Publishing Office (GPO) to work with the AOUSC on a pilot project to make PACER available at no cost to users of geographically-distributed libraries in the FDLP. A three-year pilot program was launched in 2007 at 17 federal depository libraries, 10 of which were law libraries. The program was abruptly ended in September 2008 after concerns about a security breach.

In 2011, AALL commended the AOUSC and the GPO for making PACER opinions available to the public through the GPO's FDsys, now govinfo, which provides access to authentic electronic information from all three branches of government. As of August 2019, there are 131 courts represented in the U.S. Courts collection, with 3.8 million opinions in 1.1 million cases. The U.S. Courts collection is one of the GPO's most used collections<sup>5</sup> but because Court participation is voluntary and each judge's determination of what constitutes an opinion is discretionary, the GPO collection is not comprehensive.<sup>6</sup>

<sup>3</sup> In March 2018, Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia declared some PACER fees in violation of the *E-Government Act of 2002*, which states that the Judiciary "may, only to the extent necessary, prescribe reasonable fees... to reimburse expenses incurred" in providing access to electronic court records. The case, *National Veterans Legal Services Program et al v. United States of America*, is now on appeal to the United States Court of Appeals for the Federal Circuit.

<sup>4</sup> Brief Amici Curiae by the American Association of Law Libraries, et al. for the Plaintiff, *Nat'l Veterans Legal Servs. Program v. United States*, 235 F. Supp. 3d 32 (D.D.C. 2017) (No 61).

<sup>5</sup> Email to Emily Feltren, Director of Government Relations, American Association of Law Libraries, from Laurie B. Hall, Superintendent of Documents, U.S. Government Publishing Office, August 23, 2019.

<sup>6</sup> Brief Amici Curiae by the American Association of Law Libraries, et al. and Peter W. Martin, *District Court Opinions That Remain Hidden Despite a Long-standing Congressional Mandate of Transparency—The Result of Judicial Autonomy and Systemic Indifference*, 110 Law Libr. J. (2018).



In 2012, AALL, the GPO, and the AOUSC established the PACER: Access and Education Program with the aim of increasing use of PACER at federal depository libraries, public law libraries, and public libraries. Participating libraries, which are asked to create PACER educational materials and training guides, were exempt from the first \$50 of quarterly usage charges. The program experienced low interest from libraries, with approximately 15 participating.

It is evident from the limited success of these programs that voluntary arrangements are not enough to enable law libraries to provide meaningful, equitable access to court records. ECRRA solves this problem by requiring the implementation of modern systems and eliminating the PACER paywall.

ECRRA strengthens access to justice by providing free access to more than one billion case documents in PACER. Access to justice cannot exist without robust access to legal information. Removing PACER fees would be particularly helpful to *pro se* litigants in preparing their own cases. Without the fee barrier, *pro se* litigants could view successful cases similar to their own to strengthen their legal arguments and deepen their knowledge about the judicial process.

The bill increases efficiency and accountability in the federal courts by requiring the AOUSC to work with the General Services Administration to consolidate the Case Management/Electronic Case Files system, ensuring uniform access for all litigants and requiring implementation of new technologies to improve security, affordability, and performance.

ECRRA enhances transparency by requiring that documents be text-searchable and machine-readable. It also requires audio and visual court records be made available. ECRRA directs the AOUSC to protect private information, mandating redaction of any information prohibited from public disclosure.

For these reasons, AALL supports the Electronic Court Records Reform Act, H.R. 1164. We respectfully request that this statement, along with the following letter of support, be inserted into the hearing record.



February 12, 2019

The Honorable Jerrold Nadler  
Chair  
U.S. House Committee on the Judiciary

The Honorable Doug Collins  
Ranking Member  
U.S. House Committee on the Judiciary

Dear Chairman Nadler and Ranking Member Collins:

We, the following 16 organizations, are writing in support of the Electronic Court Records Reform Act of 2019. The legislation would improve the federal courts' electronic records system enabling greater access to court records and bringing increased efficiency and transparency to the courts.

The legislation would address several of the issues raised during the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet February 2017 hearing, "Judicial Transparency and Ethics," including the federal courts' current compartmentalized electronic records system and PACER's fees for access to case materials.

The legislation would consolidate the Case Management/Electronic Case Files (CM/ECF) system and require that all documents in the system be searchable, machine-readable, and available to the public and to parties before the court free of charge. The legislation would also protect private information, requiring the courts to redact any information prohibited from public disclosure.

For these reasons, we urge all members of the House Judiciary Committee to support the Electronic Court Records Reform Act of 2019. We respectfully request the Committee to promptly consider the legislation.

Sincerely,

American Association of Law Libraries  
American Civil Liberties Union  
American Library Association  
Association of Research Libraries  
Citizen for Responsibility and Ethics in Washington  
Data Coalition  
Demand Progress  
Engine  
Government Accountability Project  
Government Information Watch  
GovTrack.us  
National Security Archive  
National Security Counselors  
Open The Government  
Project on Government Oversight  
Senior Executives Association

cc: Members of the Committee

Subcommittee on Courts, Intellectual Property, and the Internet  
Committee on the Judiciary  
U.S. House of Representatives  
6310 O'Neill House Office Building

September 25, 2019

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to submit this testimony on the risks of secrecy to the legitimacy of our court system, the legislature's ability to effectively regulate, and consumer safety. We are law professors who teach and write in the areas of mass torts and complex litigation. We write because we are concerned about what appears to be a rise in blanket sealing of documents in the cases we study.

The fundamental principle of the courts is that they be open to the public. This is important for the legitimacy of the court system, because deciding cases in secret breeds mistrust.<sup>1</sup> It is also important because the information revealed through litigation is often critical to decision-makers and citizens. For example, litigation revealed how some Remington rifles would go off without anyone pressing the trigger.<sup>2</sup> The cause of the defect in Cobalt cars that caused the engine to turn off unexpectedly was discovered through litigation.<sup>3</sup> Litigation against a fast food restaurant that served undercooked hamburgers tainted with E. coli severely injuring several children ultimately led to new federal standards for cooking meat.<sup>4</sup> These very concerns led the National Highway Traffic Safety Administration and the Consumer Product Safety Commission to recommend that the manufacturers they regulate share information often hidden from them under sweeping protective orders in litigation.<sup>5</sup>

The opioid litigation provides an example of our concern. After cities and counties filed thousands of cases against drug makers and distributors in federal court, the district judge originally placed significant numbers of documents under seal. The Washington Post intervened to obtain

<sup>1</sup> *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (open courts assure "that the proceedings were conducted fairly to all concerned," while discouraging "perjury, the misconduct of participants, and decisions based on secret bias or partiality.")

<sup>2</sup> Scott Cohn, *Remington Hid Dangers of Controversial Trigger: Documents*, CNBC.com, Dec. 8, 2015, <https://www.cnbc.com/2015/12/08/remington-under-fire-the-reckoning.html>;

<sup>3</sup> Bill Vlasic, *An Engineer's Eureka Moment with a G.M. Flaw*, N.Y. Times, March 28, 2014 (discussing General Motors' ignition switch defects).

<sup>4</sup> Jeff Benedict, *Poisoned: The True Story Of The Deadly E.Coli Outbreak That Changed The Way Americans Eat* (February Books, 2018).

<sup>5</sup> Those guidelines, however, are not binding and limited to the industries they regulate. See NHTSA Enforcement Guidance Bulletin 2015-01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 81 Fed. Reg. 13,026, 13,027-28 (Mar. 11, 2016) (recommending that litigants "include a specific provision in any protective order or settlement agreement that provides for disclosure of relevant motor vehicle safety information to NHTSA" because of the importance of "safety-related information developed or discovered in private litigation"); CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation, 81 Fed. Reg. 87,023 (Dec. 2, 2016).

access to comprehensive drug reporting data released in the course of the litigation. The Court of Appeals for the Sixth Circuit held that there was no good cause for sealing the information.<sup>6</sup> The information became the basis for a widely read Washington Post expose.<sup>7</sup> This case had a good ending because the question of whether to seal the documents was ultimately determined under the correct standard by the appellate court. But, in many complex cases, courts issue “blanket” protection orders that give the parties significant control over what court filings become public. And frequently there will be no appeal because no news outlet or public interest organization pursues the issue. As one prominent jurist long ago observed, when such blanket orders allow “parties to seal whatever they want . . . the interest in publicity will go unprotected unless the media are interested.”<sup>8</sup>

A recent Reuters report indicates that large numbers of documents are routinely filed under seal in large scale lawsuits.<sup>9</sup> We suspect that in many of these cases the standard for deciding whether documents ought to be filed under seal is not being rigorously applied because secrecy promotes settlement. Promoting settlement is an important goal for the courts, but it is not the only goal. Nor is it more important than the safety of our citizens or the ability of legislatures to access information that will allow them to adequately oversee the work of the courts, administrative agencies, and most importantly, to pass laws protecting the citizenry. Opportunities to educate the public, hold wrongdoers accountable, and potentially save lives are lost when information is hidden. In some cases, the sanctions for even egregious conduct may be too light to have a deterrent effect.<sup>10</sup>

Researchers’ attempts to study complex litigation have been stymied by protective orders sealing documents. Some of these documents directly relate to public safety, such as information that car tires tend to separate when driving on the highway causing fatal accidents. Other information involves the functioning of the court system more generally, such as court orders deciding how much court appointed special masters and lawyers get paid.<sup>11</sup> This type of secrecy makes it difficult to determine whether the system is fair and what reforms might be beneficial. We all have an interest in a fair, just, and efficient court system; a system that works in secret risks losing legitimacy as well as opportunities for improvement.

The law already sets standards for when documents may be sealed or placed under a protective order. In order for documents to be sealed, the party wishing them protected must demonstrate a

<sup>6</sup> *In re Nat’l Prescription Opiate Litig.*, 927 F.3d 919 (6th Cir. 2019).

<sup>7</sup> <https://www.washingtonpost.com/graphics/2019/investigations/dea-pain-pill-database/>

<sup>8</sup> *Citizens First Nat’l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (Posner, J.).

<sup>9</sup> <https://www.reuters.com/article/us-usa-courts-secrecy/about/reuters-analysis-of-u-s-court-secrecy-the-methodology-idUSKCN1TQ1NM>

<sup>10</sup> For example, in a case where a tire company had misled the court as to the existence of safety tests showing a tire had a tendency to separate at high speeds with fatal results, the Supreme Court reduced sanctions to a minimal amount. See *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186, 1190 (2017) (limiting attorneys’ fees sanctions to those incurred because of the discovery misconduct). In that case, the lower courts noted that protective orders played a critical role in hiding dangers from the public.

<sup>11</sup> See Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation* (working paper studying all products-liability MDLs centralized between 2004-2017 that had closed by April of 2019 finding judges disclosed compensation in fewer than 38% of appointments of special masters and other court adjuncts); ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 57-60 (2019) (documenting sealed attorneys’ fees orders).

"compelling reason;"<sup>12</sup> The more important the subject matter of the litigation to the general public, the better the reason must be.<sup>13</sup> Even where a party can show a compelling reason why certain documents should be sealed, the seal itself must be narrowly tailored to serve that reason.<sup>14</sup> Finally, the rules of civil procedure governing federal litigation require that there be "good cause" shown before a party can be prohibited from sharing information obtained in litigation.<sup>15</sup> The hope that a litigation will settle more easily if information is kept from the public should not override these important considerations. Because open courts are such a fundamental principle of our democracy, and because secrecy can lead to injury, these standards should be rigorously applied.

We are grateful to the Subcommittee for bringing this very important issue to the attention of Congress, and we appreciate the opportunity to present this testimony.

Respectfully submitted,<sup>16</sup>

/s/ Elizabeth Chamlee Burch

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<sup>12</sup> See *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir. 2019) ("This strong presumption in favor of openness [of court records] is only overcome if a party can show a compelling reason why certain documents or portions thereof should be sealed, and the seal itself is narrowly tailored to serve that reason.").

<sup>13</sup> *Id.* ("...the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access.").

<sup>14</sup> *Press Enterprise Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 509-11 (1984); *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016).

<sup>15</sup> Fed. R. Civ. P. 26(c) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . .").

<sup>16</sup> We provide our institutional affiliation for identification purposes only.

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## BY EMAIL

September 26, 2019

Honorable Henry C. Johnson, Chairman  
Subcommittee on Courts, Intellectual Property, and the Internet  
United States House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515

Honorable Martha Roby, Ranking Member  
Subcommittee on Courts, Intellectual Property, and the Internet  
United States House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Johnson and Ranking Member Roby:

Tony Mauro and the Reporters Committee for Freedom of the Press (the "Reporters Committee") respectfully submit the following written testimony to the Subcommittee on Courts, Intellectual Property, and the Internet regarding the hearing, "The Federal Judiciary in the 21<sup>st</sup> Century: Ensuring the Public's Right of Access to the Courts." We thank the Subcommittee for its efforts to increase public access to the nation's federal courts, including the Supreme Court.

Mr. Mauro is a veteran American legal journalist and a senior advisor to the Reporters Committee. Mauro has covered the Supreme Court since 1979 for Gannett, USA Today, Legal Times, and most recently for the National Law Journal, which merged with Legal Times in 2009. He is the author of several books about the Supreme Court, has served on the Reporters Committee's steering committee since 1984, and was inducted in 2011 into the Freedom of Information Act Hall of Fame, in recognition of his work promoting greater public access to the courts and other institutions.

The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee for Freedom of the Press has long urged greater transparency from the courts, for the benefit of the public.

More than 20 years ago Fred Graham, one of the Reporters Committee's founders, wrote that allowing audio and video coverage "would be immensely instructive to the American public and couldn't possibly affect the outcome of any

case.” Fred Graham, *Doing Justice With Cameras in the Courtroom*, Media Studies Journal: Covering the Courts, 32, 34 (Winter 1998). The need for greater public access to the courts through audio or video coverage has only increased in recent years. More than ever, the judicial branch has drawn intense public interest because of the importance of the cases it decides, taking a greater role in issues that affect the lives of all Americans while the other two branches are at loggerheads.

*Bush v. Gore*, 531 U.S. 98 (2000) (settling the 2001 presidential election), *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (finding the individual mandate in the Affordable Care Act constitutional), and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (holding due process guarantees right to marry for same-sex couples in same manner as opposite-sex couples) are among the landmark Supreme Court arguments that were not visible to the general public, except for the 200-plus spectators who were lucky enough to be seated in the courtroom. It simply makes no sense for the Court to deprive the public of access to these important and complex cases in the 21st century.

Lower federal courts have already taken major steps toward opening their proceedings to audio as well as video broadcast. According to a survey by Fix the Court, all 13 federal appeals courts allow for some form of audio broadcast of arguments, either on a simultaneous, same-day or delayed basis. *Judicial Wellness, Workplace Conduct and Broadcast Policies in Federal Appeals Courts*, Fix the Court, <https://perma.cc/8PNG-BDAB> (last updated June 3, 2019). Some courts have even allowed video streaming. High-profile appeals court cases, such as those related to the “travel ban” in 2017, were listened to by thousands of people who were able to understand both sides of the issue in a way that print or broadcast stories cannot fully convey. Similar access has become routine in state high courts, and studies have found that such coverage has had little or no negative impact on the judicial process. *Cameras in the Court Resource Guide*, Nat’l Ctr. for State Courts, <https://perma.cc/WRW7-ZD3L> (last updated Mar. 20, 2019); see also Kenneth Jost, *Cameras in the Courtroom*, CQ Researcher (Jan. 14, 2011), <https://perma.cc/V69R-SUB5>.

And yet, the Supreme Court persists in its refusal to allow video or live audio coverage of its proceedings and has only rarely permitted same-day audio to be released. As it stands now, the audio recordings of Supreme Court arguments are made public only on the Friday of the week in which they occur—too late for useful news coverage, because the arguments themselves take place only on Mondays, Tuesdays, or Wednesdays, with very rare exceptions.

Based on the justices’ comments over the years, many factors appear to go into their decision to stave off the cameras and microphones. Part of it is exceptionalism—the belief that the Supreme Court is unique and need not follow the trends of lower courts. Justices also assert that oral arguments take place for the benefit of the justices, not as an educational tool for the general public. Justices also argue that oral arguments represent only a small and distorted part of the decision-making process. They worry also that allowing broadcast coverage would attract grandstanding lawyers and disruptive hecklers.

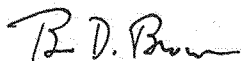
For instance, Chief Justice Roberts has said: “My judgment is that [cameras in the Supreme Court have] the potential of hurting the court.” (2018); “The Supreme Court is different, not only

domestically but in terms of its impact worldwide.” (2011); and “We don’t have oral arguments to show people, the public, how we function. We have them to learn about a particular case in a particular way that we think is important.” (2006). *See also* Richard Wolf, *Cameras in the Supreme Court? Not Anytime Soon*, USA Today (Mar. 7, 2019), <https://perma.cc/UVP4-S82S> (discussing Justice Alito and Justice Kagan’s comments that the justices have not discussed cameras in the Supreme Court since 2010); *see also* Ariane de Vogue, *No Cameras, Please: How the Supreme Court Shuns the Spotlight*, CNN (Oct. 6, 2017), <https://perma.cc/3596-L9BW>.

With respect to the justices, these rationales are not strong policy reasons to keep the public out. The Supreme Court is the ultimate people’s Court and should, at long last, recognize that the people deserve to observe its tremendously important work. If the justices continue to balk at greater access, Congress has every right and authority to require it through legislation. Congress has legislated how many justices comprise the Court, and when the Court begins its term, so it certainly can also require the Court to allow the American public audio and video access to its proceedings.

Accordingly, the Reporters Committee believes that increased public access to the nation’s federal courts, including the Supreme Court, is, on balance, an important step to promote accountability, transparency, and an informed electorate. Please do not hesitate to contact Melissa Wasser, policy analyst at the Reporters Committee, with any questions or comments. She can be reached at [mwasser@rcfp.org](mailto:mwasser@rcfp.org).

Sincerely,



Bruce D. Brown, Executive Director

/s/ Tony Mauro  
Tony Mauro, Senior Advisor

cc: Judiciary Committee Chair Jerrold Nadler  
Ranking Member Doug Collins

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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."<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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

<sup>1</sup> *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>.

<sup>2</sup> 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>.

<sup>3</sup> 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>.

EPIC Statement  
House Judiciary Committee

1

Access to Courts  
September 26, 2019

Privacy is a Fundamental Right.



available to the public will promote broader understanding about our national government and greater participation in public affairs.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> This right is so fundamental that even prison inmates have a constitutional right to law libraries and legal assistance.<sup>8</sup> 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."<sup>9</sup>

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.

<sup>4</sup> *Id.*

<sup>5</sup> 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](https://epic.org/open_gov/ecfcomments.html#1).

<sup>6</sup> 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>.

<sup>7</sup> 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.").

<sup>8</sup> *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.").

<sup>9</sup> *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.<sup>10</sup> 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.<sup>11</sup> Centralized commercial databases of local, state, and federal law also require subscriptions that cost thousands or millions of dollars a year.<sup>12</sup> 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.<sup>13</sup>

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.”<sup>14</sup> The Internet Archive was established in 1996 to promote universal access to all knowledge.<sup>15</sup> 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.<sup>16</sup> 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

<sup>10</sup> *Id.* at 598.

<sup>11</sup> 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>.

<sup>12</sup> *Id.*

<sup>13</sup> 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).

<sup>14</sup> 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/>.

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

<sup>16</sup> 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.<sup>17</sup> 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

<sup>17</sup> S.REP. NO. 107-174, at 23 (2002).