

**STATEMENT OF PROFESSOR JONATHAN L. ZITTRAIN**

**BEFORE THE SUBCOMMITTEE ON  
COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET  
OF THE**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES HOUSE OF REPRESENTATIVES**

**“PROMOTING JUSTICE BY ENSURING  
PUBLIC ACCESS TO FEDERAL COURT DECISIONS”**

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**Statement of Professor Jonathan L. Zittrain**

**Harvard Law School**

**Before the House of Representatives**

**Subcommittee on Courts, Intellectual Property, and the Internet**

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Chairman Issa, Ranking Member Nadler, and members of the subcommittee, thank you for inviting me to provide this statement on promoting justice by ensuring effective public access to Federal Court decisions.

The Critical Need for Effective Public Access to Court Decisions

Court decisions are the official public record of our American judiciary's work. They carry the full force of law, as much as legislation or regulations. All private citizens and public officials are equally bound to know them, understand them and obey them. They embody the reasoned analysis and judgments of officers duly selected to wield the power and to discharge the solemn responsibilities conferred by Article III of the U.S. Constitution. Court decisions are an indispensable part of our country's commitment to equal justice and the rule of law.

Because court decisions are so integral to our system of governance, it is imperative – and uncontested – that the public should have unfettered access to them. While court decisions historically have been reported and made available to the public in printed form, in the modern era print is inadequate to the task of ensuring transparency and public access. Too few libraries can afford to acquire and maintain the books that contain our court decisions, and too few citizens have access to those libraries. Likewise, while commercial

publishers play an important role in making many court decisions available, access to the law should not be limited to those able to pay for commercial products.

In recognition of these principles, we have undertaken an effort at Harvard Law School to transform our library's entire collection of printed state and federal court decisions into digital files that can be made freely accessible to the public online. Over the past three years, we have scanned nearly forty million pages representing our Nation's entire history of published court decisions. Our work to convert these scanned images into structured, machine-readable text is ongoing, and we plan to make these historical court decisions freely available to the public online over the coming months and years. With that retrospective effort well underway, it is a particularly auspicious moment for Congress and the courts path to provide that all future court decisions, "born digital" in judges' word processors, be available online in a citable, machine-readable format that will ensure full transparency and effective public access.

#### A Legislative Framework for Solving This Problem Already Exists

Fifteen years ago, Congress passed the E-Government Act of 2002, prompting the courts to take a first, important step in the direction of public access. Section 205 of that law required every court to establish a website that provided access to the "substance of all written opinions issued by the court ... in a text searchable format." Today, all Federal courts make their decisions available through PACER, the Federal Judiciary's system for providing access to electronic court records. Unfortunately, as this subcommittee is aware, PACER has received significant, well-founded criticism on a range of issues relating to public access to court records. We too believe PACER falls far short of providing effective public access to court decisions and other federal court records.

Fortunately, for court decisions in particular, a better system is already in place and need only be formalized and extended by Congress and the courts. In 2011, the federal courts and the Government Publishing Office (GPO) began cooperating on a project to provide unrestricted public access to federal court decisions.<sup>1</sup> As part of this project, the GPO and the courts established a process by which decisions, once issued, are transmitted to the GPO from the courts' electronic case management system. The GPO, in turn, makes these court decisions publicly and freely available online through its Federal Digital System (FDSys).<sup>2</sup> The FDSys provides a digitally-created, certified PDF of the text of each decision, together with XML files containing standardized metadata describing key features of the decision. This project began as a small pilot with twelve participating courts and today includes roughly one hundred appellate, district and bankruptcy courts. We believe this approach offers an excellent foundation and framework for ensuring public access to federal court decisions going forward.

#### Congressional Action Is Needed

Congressional action is needed, however, to formalize and extend the GPO-FDSys approach in four important respects. Without these modifications, the current approach falls short of ensuring effective public access.

First, participation in the GPO-FDSys system currently is optional, with some courts electing not to participate at all.<sup>3</sup> All federal courts should participate and submit all of their decisions to this system. The system thus should be comprehensive and mandatory.

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<sup>1</sup> Press release announcing pilot project:

[http://web.archive.org/web/20121130151800/http://www.uscourts.gov/news/newsView/11-05-04/New\\_Pilot\\_Project\\_Will\\_Enhance\\_Public\\_Access\\_to\\_Federal\\_Court\\_Opinions.aspx](http://web.archive.org/web/20121130151800/http://www.uscourts.gov/news/newsView/11-05-04/New_Pilot_Project_Will_Enhance_Public_Access_to_Federal_Court_Opinions.aspx)

<sup>2</sup> The GPO is in the process of rolling out [www.govinfo.gov](http://www.govinfo.gov) as a replacement for FDSys.

Second, participating courts currently provide the text of their decisions in PDF form only, with metadata – information about elements in a decision such as those identifying the parties and court – available in accompanying XML files. The courts should supply, and GPO should publish, the text of these decisions in a machine-readable format like XML, in addition to the human-readable PDF format. This will encourage the widespread public distribution and use of these decisions. The GPO already does this for legislative documents and agency regulations, which are available from FDSys in multiple formats, including PDF and XML.<sup>4</sup>

Third, the GPO currently does not make court decisions available for download as bulk data. As a result, accessing multiple court decisions, let alone hundreds or thousands of them, or all of them from particular courts or time periods, is difficult. Again, bulk data download is a service that GPO already supports for legislative documents and agency regulations. We propose that the GPO extend that bulk data service to court decisions.

Fourth, federal court decisions currently are not identifiable – or “citable” – using vendor-neutral and medium-neutral citation formats. For example, it is customary to identify precedential decisions by reference to their location within a series of printed, paginated volumes – many of which today are sold exclusively by a commercial publisher.<sup>5</sup> For non-precedential decisions, each commercial database provider typically supplies its

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<sup>3</sup> Courts not participating include the U.S. District Court for the Southern District of New York, the U.S. District Court for the Northern District of California, the U.S. District Court for the Eastern District of Virginia, and the U.S. Court of Appeals for the Federal Circuit, among others.

<sup>4</sup> See, e.g., [https://www.govinfo.gov/app/collection/bills/115/hr/\[0-99\]](https://www.govinfo.gov/app/collection/bills/115/hr/[0-99])

<sup>5</sup> The most common citation pattern is “[Volume number] [Title abbreviation] [Initial page number],” such as “100 F.2d 200” or “100 F. Supp. 2d 200.” These citation patterns refer to volumes published and sold exclusively by the Thomson Reuters Corporation.

own unique identifiers.<sup>6</sup> These conventions contrast starkly with those applied to legislative documents and agency regulations, where citation formats are universal, public and medium-neutral.<sup>7</sup> Moreover, they produce unnecessary confusion and undesirable entanglements between the courts and commercial vendors. In the modern era, where courts can easily “publish” their work directly online, vendor-dependent and page-dependent citations are a needless, outdated impediment to access. The courts instead can make their decisions citable using a vendor-neutral and medium-neutral format, such as one that refers to the year of the decision, the issuing court, the docket number for the case, and the sequential number of the opinion within the case. The courts also can adopt paragraph-numbering in all their decisions to enable internal citations that do not require pagination.

We believe all of these changes can be made through a slight modification to the text of Section 205 of the E-Government Act of 2002. Included as Appendix A is proposed modifying language. These changes may appear modest in scope, and indeed they are, but they will have an enormous positive impact on public access to court decisions.

#### Effective Public Access Promises Major Benefits with No Drawbacks

We have already noted that court decisions are indispensable to our country’s commitment to equal justice and the rule of law. As such, transparency and effective public access are extraordinary benefits in and of themselves. But these are far from the only benefits. The changes we propose also promise to enhance court efficiency, spur private

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<sup>6</sup> The most common citation pattern for these decisions is “[Year][Vendor abbreviation][Unique identifier],” such as “2017 WL 1234567” or “2017 U.S. Dist. LEXIS 12345.”

<sup>7</sup> Legislative documents are identifiable using vendor-neutral citation formats such as “15 U.S.C. 100,” “H.R. 2000, 115<sup>th</sup> Cong. § 2A (1997).” Agency regulations are citable by their location within the Code of Federal Regulations: “25 CFR Part 115.”

sector innovation, enable new forms of research and scholarship, and reduce costs for those who regularly access legal information, including government lawyers and other public officials.

Moreover, we believe ensuring effective public access has no drawbacks and will be uncontroversial for several reasons. First, no PACER-related revenue is at risk. Unlike briefs, motions and other courts records, all of which carry hefty PACER price tags, all PACER fees for court decisions have been waived. Second, the burden on the courts and the GPO should be minimal, as the technical systems and procedures needed to support this shift in favor of public access are already in place and working. Third, the approach we propose for court decisions is equivalent to that which other branches of the federal government have long since adopted. No sound reason exists for the decisions of our courts to be harder to access than the laws enacted by Congress and regulations and orders promulgated by the Executive Branch. Fourth, there is broad support within the Judicial Conference for measures to increase public access to the decisions of the various courts, as demonstrated by the courts' widespread participation in the GPO-FDSys pilot project and as confirmed by our consultations with members of the Judicial Conference. In short, there is no material downside to the measures here proposed, and the advantages are undeniable.

These modest yet important steps will ensure effective public access to federal court decisions, and I and many others managing libraries safeguarding the record of our laws stand ready to assist your efforts in that regard in any way we can. Thank you for your efforts to promote transparency in the courts and for inviting me to submit this statement.

## APPENDIX A – PROPOSED MODIFYING LANGUAGE

Sec. 205 of the E-Government Act of 2002 (116 Stat 2899, PL 107-347, HR 2458)  
(proposed changes in bold italics):

### SEC. 205. FEDERAL COURTS.

(a) **INDIVIDUAL COURT WEBSITES.**—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

- (1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.
- (2) Local rules and standing or general orders of the court.
- (3) Individual rules, if in existence, of each justice or judge in that court.
- (4) Access to docket information for each case.
- (5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable ***and machine-readable file*** format ***that is citable using a vendor-neutral and medium-neutral citation system.***
- (6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).
- (7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

### (b) MAINTENANCE OF DATA ONLINE.—

- (1) **UPDATE OF INFORMATION.**—The information and rules on each website shall be updated regularly and kept reasonably current.
- (2) **CLOSED CASES.**—Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.
- (3) **BULK ACCESS.**--***All written opinions made accessible on each website under subsection (a)(5) shall also be made available to the***

*Government Printing Office, which shall provide them to the public for bulk download.*

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