

Program on Extremism

THE GEORGE WASHINGTON UNIVERSITY

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

Written Testimony of:

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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 **P**ublic **A**ccess to **C**ourt **E**lectronic **R**ecords. The name is a misnomer – public access comes at an exorbitant cost¹ – 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.²

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.

¹ 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.

² 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.³ 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.⁴

ECF Query Reports Utilities Logout
Criminal Cases Report

Warning: This report is not subject to the 30 page billing cap.
You will be billed for the total number of pages. If you want to run a report for a single case, you can use the Query Menu or the Docket Report.

Office: Washington, DC | Case types: All Writs Act, Criminal | Case flags: 2255, 3JUD-PANEL

Citation
Count Status: 18:1956-7100.F MONEY LAUNDERING - BRIBERY
Include CVB Cases: 18:1956-7400.F MONEY LAUNDERING - EXTORTION, RACKET...
Filed: 18:1956-7477.F LAUNDERING OF MONETARY INSTRUMENTS
Terminal digit(s): 18:1956-7480.F MONEY LAUNDERING - RACKETEERING
Sort by: 18:1956-7481.F MONEY LAUNDERING - RACKETEERING - RO...
Output Format: 18:1956-7482.F MONEY LAUNDERING - RACKETEERING - TH...
18:1956-7490.F MONEY LAUNDERING - RACKETEERING - EX...
18:1956-7530.F MONEY LAUNDERING - GAMBLING/LOTTERY:...
18:1956-7600.F MONEY LAUNDERING - KIDNAPPING, FEDER...
18:1956-7611.F MONEY LAUNDERING - KIDNAP, HOSTAGE
18:1956-9752.F MONEY LAUNDERING - ESPIONAGE

Run Report Clear

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.⁵ 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

³ 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.

⁴ 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.

⁵ 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.

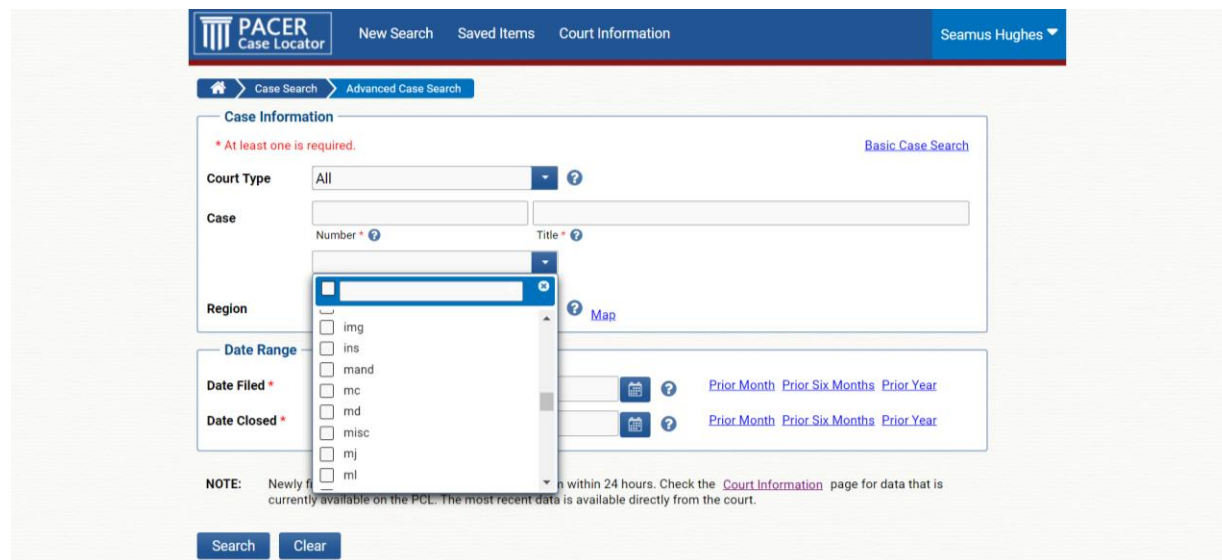
Trial exhibits introduced into evidence are routinely unavailable on PACER. This then requires the public to reach out to the local U.S. Attorney's office or defense attorneys to receive the documents. Some offices are forthcoming in providing information, while others ignore the request given their 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.⁶

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.

⁶ 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.⁷ 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.⁸

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.

⁷ 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>

⁸ 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.⁹

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.¹⁰ 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.”¹¹ 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.¹² 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.

⁹ 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.

¹⁰ 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.

¹¹ 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>

¹² 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.