

**COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA, AND
ADVANCED PUBLICATIONS, INC.,
THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION,
THE COPLEY PRESS, INC., COX ENTERPRISES, INC., GANNETT COMPANY INC.,
THE MCCLATCHY COMPANY, THE NEW YORK TIMES COMPANY, THE
TRIBUNE COMPANY, AND THE WASHINGTON POST,
ON PUBLIC INTERNET ACCESS TO PLEA AGREEMENTS
FILED AS COURT RECORDS**

These comments are submitted by the Newspaper Association of America (NAA), a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for 87% of the U.S. daily newspaper circulation. One of the NAA's missions is to advance public policies that are intrinsic to the role of the press in a free and democratic society, including access to court records.

These comments also are submitted on behalf of the following newspaper publishers:

- Advance Publications, Inc. is a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities, weekly business journals in over 40 cities, and over 25 magazines with nationwide circulation, as well as owns interests in cable systems serving over 2.3 million subscribers.
- The California Newspaper Publishers Association is a trade association representing the interests of its approximately 750 daily, weekly and student newspapers. For over 130 years, the CNPA has stood for the rights guaranteed by the First Amendment, for freedom of information and the right to gather and publish the news.
- The Copley Press, Inc. is the publisher of *The San Diego Union-Tribune*, the largest daily newspaper published in San Diego County, California.
- Cox Newspapers, Inc. and its parent Cox Enterprises, Inc. publish 17 daily and 27 non-daily newspapers with a combined circulation of approximately 2 million.
- Gannett Co., Inc. is an international news and information company that publishes 85 daily newspapers in the US, including USA TODAY. Gannett owns nearly 1,000 non-daily publications, including USA Weekend, a weekly newspaper magazine. The company also owns 23 television stations and a national news service, and operates over 200 Internet sites worldwide, including more than 130 that are integrated with its publishing and broadcasting operations.

- The McClatchy Company publishes 31 daily newspapers and 47 non-daily newspapers throughout the country, including the *Sacramento Bee*, the *Miami Herald*, the *Kansas City Star* and the *Fresno Bee*. The newspapers have a combined average circulation of approximately 2,800,000 daily and 3,500,000 Sunday. The McClatchy Company has no parent corporations, and no publicly held corporation owns 10% or more of its stock.
- The New York Times Company publishes The New York Times, The International Herald Tribune, The Boston Globe and 16 other newspapers. It also operates eight network-affiliated television stations, two New York City radio stations and more than 40 Web sites, including NYTimes.com, Boston.com, and About.com. The Times has a circulation of more than 1.1 million subscribers daily and 1.6 million on Sunday and regularly covers the courts and criminal justice issues around the country.
- The Tribune Company publishes eleven market-leading newspapers, including the *Los Angeles Times*, the *Chicago Tribune*, *The (Baltimore) Sun* and *Newsday*. It also operates television stations in 19 of the nation's largest markets and local and national websites that together rank among the top 25 news and information networks in the United States.
- *The Washington Post* is a leading newspaper with a nationwide daily circulation of over 699,000 and a Sunday circulation of over 929,000. The newspaper is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.

We strongly believe that the current case-by-case approach, grounded in the time-honored balancing analysis that requires the presence of a compelling interest in order to shield a plea agreement from public view, continues to present the appropriate framework for addressing any countervailing concern arising from Internet access to plea agreements. In the electronic world, litigants may continue to file motions to seal specific portions of plea agreements entirely from public view, or to exclude specific documents from electronic availability. Judges would then exercise their traditional discretion to decide whether the interests articulated are sufficient to overcome the usual presumption of open access, and whether the remedy sought is properly tailored to that interest. Currently, there is no reason to believe that this approach will not adequately address privacy or safety interests in plea agreements. Accordingly, we see no reason why the federal Judiciary should depart from this time-tested approach to resolving competing access and privacy or security interests in particular cases.

I. Introduction

The federal Judiciary has requested comments on the privacy and security implications related to public Internet access to plea agreements filed as federal criminal court records. The focus of the Judiciary is with respect to "identifying defendants who are cooperating with law enforcement investigations." See Federal Judiciary News Release, dated September 10, 2007. Public comment is also requested as to "potential policy alternatives." See *Judiciary Privacy Policy — Request for Comment on Privacy and Security Implications of Public Access To Certain Electronic Criminal Case File Documents*. The federal Judiciary/Department of Justice acknowledge in the request the "long tradition — rooted in both constitutional and common law principles — of open access to public court records. *Id.* It also recognizes that court records, "unless sealed or otherwise subject to restricted access by statute or federal rule, have traditionally been available for public inspection and copying." *Id.* The law regarding access to criminal and civil court records is also summarized in the paper entitled *Privacy and Access to Electronic Case Files in the Federal Courts*, prepared by the Office of Judges Programs of the Administrative Office of the United States Courts. The law clearly establishes a presumption in favor of access to judicial records, based in common law or the Constitution. Court records to which a First Amendment access right attaches cannot be shielded from public scrutiny absent strict compliance with the "compelling interest" test. See *Richmond Newspapers, Inc. v. Virginia (Richmond Newspapers)*, 448 U.S. 555 (1980); *Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982); *Press-Enter. Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enter. Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986); *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 149-151 (1993).

The First Amendment access guarantee applies to plea agreements. See *The Oregonian Publishing Co. v. United States Dist. Ct. ("Oregonian")*, 920 F.2d 1462 (9th Cir. 1990), *cert. denied*, *Wolsky v. Oregonian Publishing Co.*, 501 U.S. 1210 [111 S. Ct. 2809, 115 L. Ed. 2d 982] (1991); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (recognizing a First Amendment right of access to plea agreements, and requiring courts to make findings under the "compelling interest" test to support a sealing order); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (recognizing a First Amendment right of access, and requiring courts to comply with procedural and substantive requirements for denying access to plea and sentencing hearings and related documents); *United States v. Kooistra*, 796 F.2d 1390, 1391 (11th Cir. 1986) (recognizing both First Amendment and common law rights of access to plea agreements, and requiring courts to articulate reasons for denying motions to seal plea agreements); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) ("Plea hearings have typically been open to the public and such access, as in the case of criminal trials, serves to allow public scrutiny of the conduct of courts and prosecutors."); *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989) (public access to guilty pleas reveals the basis on which society imposes punishment, especially valuable when the defendant pleads guilty while protesting innocence.") See also *United States v. Alcantara*, 396 F.3d 189 (2d Cir. 2005) (District Court infringed public's First Amendment right of access by *sua sponte* conducting plea colloquy and sentencing in robing room rather than in open court); *United States v. Northrup Corp.*, 746 F.Supp. 1002 (recognizing First Amendment right of access to plea agreement exhibit listing investigations for which Government agreed not to prosecute defense contractor except for references to ongoing criminal investigations); *Doe v. Hammond*, 2007 WL 2398576 (D.D.C.) (finding the government did not violate rule prohibiting disclosure of matter occurring before grand jury by entering into plea

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agreement which identified named employee); *United States v. Crompton Corp.*, 399 F.Supp. 1047 (N.D.Cal. 2005) (public interest as dictated by the First Amendment required plea agreement to be made public without redaction of chief executive officer's name). Federal Rule of Criminal Procedure 11 also requires district courts to conduct guilty plea proceedings in "open court." *See* Fed.R.Crim.P. 11(b)(1) (2004).

We believe that, in light of the strong public interest in access to plea agreements, which resolve the vast majority of criminal cases, the federal judiciary should maintain its traditional reliance on litigants and the government to protect any countervailing interests through motions to seal, and that no additional protections are required at this time. Our comments focus on why maximizing electronic access to plea agreements is wise policy.

II. The Importance of Public Access to Federal Plea Agreements Filed As Court Records and Remote Public Access in Particular

A. Public Access To Court Proceedings And Court Records Is Fundamental To Our Form Of Government

Public access to court proceedings and court records is fundamental to our form of government, which depends upon an informed citizenry, the rule of law and government accountability. The public nature of judicial proceedings has been so integral a part of our government that it is easy to take it for granted; and therefore its importance bears explicit recognition.

In the largest sense, access to court records helps people understand how the judicial system works; it fosters public confidence in the judicial system; and it assures that judges, and all participants in a court proceeding, "perform their duties in an honest and informed manner." *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991). As Justice Holmes put it, access ensures "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." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1882). By ensuring public access to the judicial system through open procedures and records, the courts promote public acceptance of the outcome of those proceedings and respect for the rule of law. *See, e.g., Jessup v. Luther*, 227 F.3d 993,997 (7th Cir. 2000).

B. Public Access To Federal Plea Agreements In Particular Is Fundamental To Our Form Of Government

By affording a First Amendment right of access to plea agreements, courts have recognized the crucial importance of public access to plea agreements, as in many cases "the plea agreement takes the place of the criminal trial." *See Oregonian*, 920 F.2d at 1466, citing *Brady v. United States*, 397 U.S. 742, 752 [90 S. Ct. 1463, 25 L. Ed. 2d 747] (1970) (well over three-fourths of criminal convictions rest on guilty pleas). As the Ninth Circuit reasoned, denying access to plea agreements "would effectively block the public's access to a significant segment of our criminal justice system," and "the [o]penness in criminal proceedings 'enhances both the basic fairness of the criminal proceeding and the appearance of fairness so essential to public confidence in the system.'" *Id.*, citing *Press-Enterprise I*, 464 U.S. at 508. Openness ensures

judicial decisions are properly reached, and that any flaws are exposed and subjected to public comment. *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 508-10. It curbs prosecutorial and judicial misconduct, and fosters public trust in the system's integrity. *Phoenix Newspapers, Inc.*, 156 F.3d at 948. Accordingly, the party seeking to keep a plea agreement secret must meet a heavy burden to justify interference with the public's First Amendment right of access, *i.e.*, denial must be "*strictly and inescapably necessary*" to protect a compelling government interest. *Associated Press v. United States Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983). Any denial of access must also be narrowly tailored to serve only that interest. *Globe Newspaper Co.*, 457 U.S. at 606-07.

The court in *United States v. Alcantara*, 396 F.3d 189, also recognized that plea agreements are of paramount importance to both the accused and society, as they discourage the prosecutor and the court from engaging in arbitrary or wrongful conduct: "The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence." *Id.* at 197. Public access is important to achieve the "community therapeutic value" recognized by the Supreme Court in *Richmond Newspapers*, 448 U.S. at 570, which is particularly true when the defendant is someone like former Congressman Randall "Duke" Cunningham who pled guilty to the largest bribery scandal in the history of the United States Congress. See Opinion, *Blatant Bribery Imprison Cunningham, Go After Contractors*, San Diego Union-Tribune, November 29, 2005, at B6.

In a related plea, co-conspirator no. 3 in the Cunningham bribery scandal was processed through our judicial system largely in secret. See *Calbreath, Cunningham Financier Admits Role in Scandal, Help With Home Buying Revealed In Guilty Plea*, San Diego Union-Tribune, June 15, 2007, at A1. When his plea agreement was finally made public, it revealed beneficial treatment by our government for some unspecified reason. *Id.* The press continues to cover this story, in order to hopefully be able to tell the public why the Defendant has been treated so favorably. Such misconduct by government officials and employees has occurred in many other cases as well. See, *e.g.*, Lardner & Pincus, *Ex-CIA Aide Admits Iran-Contra Role; Fiers Pleads Guilty in Coverup, Says Others in Agency Knew of Funds' Diversion*, Washington Times, July 10, 1991, at A1; Folks & Keary, *Barry Case Shifts to the Fast Track*, Washington Times, Jan. 31, 1990, at A1 (regarding Marion Barry's prosecution).

The vital importance of public access to plea agreements has been recognized in a wide variety of contexts, demonstrating the many ways in which the public interest in access to plea agreement may be manifested. In *United States v. Northrop Corp.*, 746 F.Supp. at 1003, for example, the court emphasized the importance to society of public access and debate regarding plea agreements with government contractors, especially those which contained the government's agreement not to prosecute other offenses. In *Doe v. Hammond*, 2007 WL 2398576 at *1, the court recognized the importance of public access to plea agreements that provided immunity for certain British Airways employees in a case alleging antitrust violations against the air carrier. Similarly, in *United States v. Crompton Corp.*, 399 F.Supp.2d at 1049-50, a case involving plea agreements with a corporation that showed the government's agreement not to prosecute certain employees, the Court noted that plea agreements are by nature contractual, and the government has wide discretion in the terms proffered. Thus, scrutiny of prosecutors and courts is especially critical at the plea agreement stage.

These are a few examples out of many that underscore why the public right of access to plea agreements must not be unnecessarily curtailed. As with other court records, the public—generally via the press—learns two important kinds of information from plea agreements. The first is the substance of specific court proceedings. In criminal cases, where deprivation of the defendant's liberty is often the result and protection of the community is a vital concern, the public interest in learning the particulars and the results of individual cases is obvious. The second kind of information concerns the operation of the judicial system as a whole. Through court records, the public can monitor the performance of the court system, including the types of plea agreements proffered by our government for particular crimes in different federal courts throughout the country.

As explained in more detail below, journalists use plea agreements in both these ways, and thereby serve as the eyes of the public with respect to how most crimes are resolved in this nation. On a daily basis, journalists use plea records to help keep our society current and informed on newsworthy events concerning the business of the courts. Reporters also rely on access to court records to publish in-depth stories that shed light on the functioning of the courts themselves and on other larger public issues.

1. Examples of Daily News Coverage of Plea Agreements

For daily news coverage, court records provide a reliable means of finding and checking important historical information about plea agreements. Important national and local stories have emerged as a result of these court records checks, including:

- Ainsworth, *Lawmakers Urged To Donate Contributions, May Have Received Money From Lawyer In Kickback Scheme*, The San Diego Union-Tribune, September 20, 2007, A3 (discussing Class Action Lawyer William Lerach's guilty plea to a fee kickback scheme)
- McDonald, *Lerach Plea Gives Coke New Defense, Soft Drink Giant Claims That Lawyer Used Tactics In Shareholder Suit Against Coke That Were Similar To Those He And A Partner Employed In Matter That Led To Their Guilty Pleas*, Daily Report, October 19, 2007, A1
- Kridel, *City Supervisor Admits Taking Bribes From Firm*, Chicagotribune.com, September 27, 2007 (http://www.chicagotribune.com/new/local/northwest/chiberger_27sept27)
- UIP, *Fla. Rep's Peal Denied In Abscam*, Philadelphia Daily News, November 16, 1984, A 17
- New York Times Abstracts, *Federal District Judge John Garrett Penn, Saying Conduct of Investigation In Abscam Case "Bordered On the Outrageous" Refuses To Overturn Convictions of Form Rep. John W. Jenretta, Jr. and Co-defendant John Stowe For Accepting \$50,000 Bribe*, August 5, 1985 at 8/5/83 NYT-ABS 16

- Associated Press, *Australian Convicted in Terrorism Case*, International Herald Tribune, March 30, 2007, A1 (discussing plea of David Hicks for providing material support for terrorism)
- Bachelet, *A U.S. Judge Approved A \$25 Million Plea Agreement Between Chiquita and Federal Prosecutors Over Protection Money*, The Miami Herald, September 18, 2007, C1
- Fuller, *Dixon Friend Pleads Guilty*, Baltimore Sun, September 27, 2007 (<http://www.baltimoresun.com/news/local/annearundel>) (discussing plea of Baltimore Mayor Sheila Dixon's former campaign chairman)
- AP Alert, *Vick's Remaining Co-Defendants Set Hearings For Plea Agreements*, August 14, 2007

2. Examples of In-Depth Stories or Series

Court records also have made it possible for newspapers to publish in-depth stories, or series of stories, on crucial, and often complicated, criminal justice issues. The availability of court records enables reporters to identify events and trends and to monitor the workings of courts and other government agencies. Often these stories look at issues of the effectiveness and fairness of the criminal justice system—subjects of obvious importance to all citizens. Here are some examples of investigative stories on topics of great public interest that relied heavily on plea agreements:

- "Tainted Trials, Stolen Justice," San Jose Mercury News, 2006 (<http://www.mercurynews.com/taintedtrilas>) (discussing a three-year investigation into the criminal judicial system in Santa Clara County, California, found questionable conduct by the prosecution, defense or the courts in nearly a third of the cases examined, including many resulting in guilty pleas)
- Tulskey, *Review Of More Than 700 Appeals Finds Problems Throughout Judicial System*, San Jose Mercury News, 2006 (<http://www.mercurynews.com/portlet>)
- Dujardkin, *It's A Rare Day That A Judge Turns Down A Plea Agreement*, The Daily Press, Inc., October 15, 2007, B1
- Nolan, *Justices Call For More Precise Working In Plea Agreements*, The Connecticut Law Tribune, September 10, 2007, Vol. 33, No. 23, page 1
- Jennings and Spangeberger, *Victims Fearful Of Abuse, Arrests: The State Has Gotten Tough On Child Sex Abusers*, October 21, 2007, Dallas Morning News 1A (article discusses plea agreements for sex abusers)

As these examples illustrate, plea agreements are longstanding, fundamental and crucial newsgathering tools. In sum, plea agreements help newspapers get stories right, make stories better, and publish stories of public importance that we could not otherwise write.

C. **The Importance of Internet Access**

Over the past several years, remote access to court records, in particular, has become an integral part of the newsgathering process. Many of the newspaper stories described above utilized remote access, and, as a practical matter, could not have been published without such access.

At the present time, the PACER system affords remote access to federal dockets and case filings. Given the practical impossibility of checking the records in all federal courthouses, and the need for access at hours after the courts have closed—especially during breaking news events—newsrooms have relied on the current PACER system to help bring important stories to the public. When news is breaking, PACER permits newspapers to do the most basic fact checking after the courts are closed. PACER eliminates the need for time consuming trips to the courthouse to monitor cases for routine but noteworthy developments such as trial dates, and motion filings. PACER also lightens the workload of the court personnel who are not required to assist the reporters.

The Judicial Conference's careful study of this issue is laudable. The ability to read and download plea agreements from PACER is a tremendous resource for attorneys, judges, court personnel, and the public, including the press. It enhances our ability to publish timely daily stories and in-depth investigations on plea agreements. It reduces the amount of time court personnel spend handling requests from the press and the public to review them. By increasing the accessibility of information about the work of the federal courts, it also promotes public confidence in the judicial system.

D. **Any Policy Restricting Public Access To Court Records, Including Plea Agreements, Reverses The Constitutional Presumption of Public Access**

As the First Circuit recognized in *In re Providence Journal Company, Inc.*, 293 F.3d 1, 10-12 (1st Cir. 2002), a "blanket nonfiling policy" with respect to judicial records—especially those, like plea agreements, that are material to a court's disposition of a criminal matter—reverses the constitutional presumption of public access. *Id.* at p. 11. *Cf. Associated Press*, 705 F.2d at 1147 (automatic sealing orders of even limited duration impermissibly reverse the "presumption of openness" that "characterizes criminal proceedings under our system of justice"), citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 573; *see also Globe Newspaper Co. v. Pokaski*, 868 F.2d. 497, 507 (1st Cir. 1989) (a statute that restricts public access to judicial records in criminal cases by "plac[ing] on the public the burden of overcoming inertia" is constitutionally impermissible); *United States v. Graham*, 257 F.3d 143, 150-53 (2d Cir. 2001) (same). Here, if electronic access to plea agreements is denied or curtailed, it would thwart viable access to them for most of the nation's journalists, and effectively diminish the constitutional presumption of public access which attaches to them.

III. Existing Court Practices Are Adequate to Protect Privacy or Security Interests

The federal courts have always relied on a case-by-case approach to protect compelling countervailing interests implicated by access to court records. A concerned party can file a motion requesting that the court seal specific documents to shield them from public view. The court then must decide whether the movant's concerns with regard to the specific documents are sufficiently compelling to overcome the general presumption of open access. The trial judge may then fashion an appropriately tailored sealing order that serves the specific interest while safeguarding the public's interest in an open court system.

In addressing the adequacy of the courts' current practice, it is important to note at the outset that the vast bulk of the information contained in federal plea agreements should not raise privacy or security concerns. Information that might be considered private in other contexts is less so when made part of a public court file. Courts also hold meaningful hearings and make detailed findings on sensitive issues regarding witness safety—something that can be done without identifying the witnesses at risk. *See Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) *cert. denied*, 524 U.S. 958 [118 S. Ct. 2380, 141 L. Ed. 2d 747] (1998); *United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979) (same); *United States v. Doe*, 63 F.3d 121 (2d Cir. 1995) (remand of denial of closure motion due to sparseness of the evidentiary record). Thus, genuine concerns about plea agreements should only exist as to a small amount of information contained in a small subset of them, such as an informant's identity. Courts have ample authority to issue sealing or other protective orders to shield such information from public view.

Those who voice support for implementing across-the-board restrictions on access to electronic case files, as well as this request for comments, cite to the U.S. Supreme Court's decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), interpreting the Freedom of Information Act (FOIA) to support their position. But there are several differences between the *Reporter's Committee* case and the case of access to electronic plea agreements filed as court records.

First, the *Reporters Committee* case concerned records of the executive branch, not court records. Specifically, *Reporters Committee* involved FBI "rap sheets", which are multi-state summaries of an individual's criminal history and include "descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations." 489 U.S. at 752. Rap sheets are not documents filed in a courthouse. Rather, the FBI gathers this information from law enforcement agencies at all levels of the federal and state governments. *See id.* Federal rap sheets; in stark contrast to plea agreements and virtually all other court records, are detailed, multi-jurisdictional criminal histories, compiled for law enforcement purposes and never intended to be public documents (even if some of the underlying data might be available in other public records). *See id.* at 752-54.

Second, the concern underlying the *Reporters Committee* decision was not with the fact that records were stored, or that access would be provided, by electronic means. The concern stemmed instead from the fact that the data itself was a compilation of information about a person that was gathered from disparate sources, and which when assembled in a central location presented a cumulative personal portrait that could amount to an invasion of privacy. As the Court explained:

Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Id. at 764. As Judge Starr put it at the court of appeals level, "computerized data banks of the sort involved here present issues considerably more difficult than, and certainly very different from, a case involving the source records themselves." *Id.* at 760, quoting 831 F.2d at 1128 (Starr, dissenting). Repeatedly, the Supreme Court emphasized the "difference between scattered bits of criminal history and a federal compilation." *Id.* at 767.

Plea agreements are not a "computerized summary" of judicial and non judicial records—"compilation" of "scattered bits" of information about an individual that might in assembled form implicate some interest in personal privacy or security. Here the public would simply have electronic access to "the source records themselves"—the same plea agreements filed as court records that are accessible today through physical inspection. To be sure, electronic access will make the inspection of public plea agreements easier. But making inspection of a public court record easier does not invade any privacy interest of any litigant, and compelling security concerns can be handled with a lesser restrictive alternative such as redaction. *Reporters Committee* simply cannot be read to mean that it violates a litigant's privacy to save an interested member of the public a trip to the courthouse.

Third, there is an important practical difference between electronic access to plea agreements and access to FBI "rap sheets" under FOIA that was addressed in the *Reporters Committee* case. Denying any possible privacy interest in FBI "rap sheets" would mean that the FBI would have to produce rap sheets in response to any person's FOIA request for anyone else's rap sheet—a prospect that would invite routine requests from employers and others, place an enormous burden on the agency, and result in the wholesale dissemination of FBI records that have not been traditionally available to the public. Allowing electronic access to public plea agreements from court files would place a burden on no one, because access would be simple and automatic and it would result in the dissemination of no information that is not already available to the public.

Finally, because *Reporters Committee* involved executive branch records sought under FOIA, the sole issue before the Court was whether the disclosure of FBI rap sheets to third parties "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 7(C). *Id.* at 751. None of the First Amendment or common law rights that attach to court records were implicated by the FOIA request for FBI rap sheets. Instead, the Court was deciding purely "what the framers of the FOIA had in mind" when they created the exemption at issue. *Id.* at 765. The Supreme Court's balancing analysis to determine whether disclosure of FBI rap sheets could result in an "unwarranted invasion of personal privacy" was purely a matter of statutory interpretation. Had court records been at issue, the Court would have had to address a different and, much more demanding test, in order to maintain the records under seal – whether the privacy interest articulated is sufficiently compelling to overcome the presumptive right of public access, and whether an order sealing the

records (as opposed to other protective measures that may be available) is narrowly tailored to serve that interest.

The demanding nature of the standard for sealing court records is grounded in our country's longstanding belief that open courts are fundamental to our democracy, and its commitment to the rule of law. By contrast, the Court specifically noted that "most States deny the general public access to their criminal-history summaries" and that it was "reasonable to presume that Congress legislated with an understanding of this professional point of view." *Id.* at 767.

In light of all these material distinctions, the *Reporters Committee* case provides no legal authority that would permit, much less justify, a fundamental change in the federal judiciary's current case-by-case access policy.

IV. The Policy Alternatives

For the reasons explained in Sections II and III above, we believe strongly that the federal judiciary should provide the same electronic access to electronic criminal case plea agreements as the courts provide to other court records. Rather than adopting a blanket prohibition on electronic access to plea agreements, the judiciary should maintain its traditional case-by-case approach, which does not preclude motions to seal names from all copies of a plea agreement—electronic and hardcopy—or motions to make certain plea agreements accessible only at the courthouse.

V. Conclusion

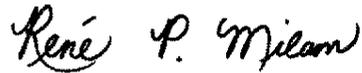
Electronic access to plea agreements filed with federal courts as public court records should complement—rather than erode—the important interests that are served by openness. As the newspaper stories summarized in Section II illustrate, access to plea agreements provides valuable information about the business of the federal courts and about the functioning of the court system and other government agencies as a whole. By doing so, open plea agreements help inform our citizenry, promote public awareness and the accountability of the court system, and, in the end, strengthen our democracy and the rule of law. Electronic access to federal plea agreements (especially remote electronic access) will multiply these benefits by making them accessible more widely, more easily, and more cost-effectively. We therefore strongly urge you to retain electronic access to plea agreements entered in criminal cases.

While we recognize the need to balance access, privacy and security interests in making decisions about public disclosure and dissemination of plea agreements, we are deeply concerned that the court system, in attempting to address the concerns of those advocating privacy and security protections, will regulate electronic access in a manner that would not give appropriate weight to the importance policies that underlie open access to court records. The resolution of the fundamental interest in public access to and understanding of judicial proceedings and any competing privacy or security concerns should be resolved through the application to electronic plea agreements of the same well-reasoned access policy that always has applied to court records.

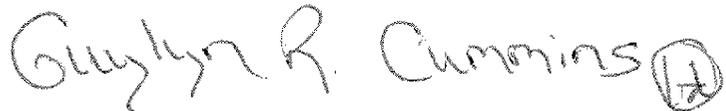
The issue of public access to criminal plea agreements is profound. We appreciate the opportunity to submit these comments. We urge the Judicial Conference to hold public hearings if it is at all inclined to adopt a policy that would depart from the court system's longstanding approach of public access to plea agreements. We respectfully request an opportunity to participate in any such hearings.

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Respectfully submitted,



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