India C. Whedbee. Authentication of Federal Court Opinions Online. A Master's Paper for the M.S. in L.S degree. December, 2010. 43 pages. Advisor: Julie Kimbrough

Legal materials have become accessible online in several different settings, and many federal courts have endeavored to provide access to court opinions on their own Websites. As case law constitutes a large and vital portion of the American legal system, increased access to this ever-growing body of law is an important effort. However, it matters much less that greater access to court opinions has been provided if the opinions provided are not in fact true representations of the actual documents filed by the court.

The purpose of this paper is to study the current availability of authenticated online federal court opinions by surveying the opinions offered by the federal courts on their own, court-hosted Websites. At this time, no federal court Website takes any visual measures to authenticate the opinions it provides to users.

Headings:

Court opinions -- United States

Law -- Internet resources

Legal literature -- Evaluation

AUTHENTICATION OF FEDERAL COURT OPINIONS ONLINE

by
India C. Whedbee

A Master's paper submitted to the faculty
of the School of Information and Library Science
of the University of North Carolina at Chapel Hill
in partial fulfillment of the requirements
for the degree of Master of Science in
Library Science.

Chapel Hill, North Carolina

December 2010

Approved by

_____

Julie Kimbrough

Table of Contents

Introduction

> "[N]o one is checking the online version to be sure that it accurately reflects the law . . . . This problem is obvious enough. Short of the Dr. Evil scenario of someone hacking in and altering the information for fun or profit, simple errors could be introduced and compounded. Material could be lost. And then there is Dr. Evil."
> (Berring, 2007, pg. 280).

The Internet has brought about many benefits for those who have access to it. Ease of communication, increased access to knowledge, and the far-reaching dissemination of information are only a few of the improvements brought about by the World Wide Web. The U.S. government has not been oblivious to these developments, and it has ventured to exploit the Internet for at least one common public good: increased access to government information.

These efforts to provide increased access include examples from all three branches of government: Congressional bills appear on the Library of Congress' Thomas Website, executive branch documents appear on agency Websites such as the Environmental Protection Agency site, and court opinions from the federal judiciary on appear on the PACER Website (http://thomas.loc.gov; http://www.epa.gov; http://www.pacer.gov). While increased access is an admirable goal (Martin, 2008, pg. 856), with it comes certain concerns, one of which is authenticity. The need for access to public government information is, arguably, great; the need for access to *authentic* public government information is, arguably, even greater. While this caveat applies to information from all three branches of government, one area of particular concern is online court opinions.

Communication and access are essential tenets of the law (Martin, 1999, pg. 187). A critical underpinning of these tenets is that what is communicated and made accessible is actually "what it purports to be"(Kunsch, 1997, pg. 754). Legal materials have become accessible online in several different settings, including federal government hosted Websites, private subscription services, and privately-maintained open access Websites. The purpose of this paper is to study the current availability of authenticated online federal court opinions by surveying opinions offered by the federal courts on their own, court-hosted Websites.

Background

The Role of Court Opinions in U.S. Law

The American legal system is built around two primary sources of law: enacted law, including constitutions, statutes, and treaties, and case law, consisting of court opinions from individual cases that either interpret enacted laws or contribute to the common law (Burnham, 2002, pg. 37-39). Precedent, or *stare decisis*, a remnant of the English legal system, is the notion that a judicial decision in one case should control the outcome of other similar cases, and it is an important doctrine in American jurisprudence (Farnsworth, 1996, pg. 51). Additionally, case law that has interpreted enacted law, such as an opinion in which a judge interprets a federal statute to apply or not apply in a given instance, is considered to be "derivative" of the enacted law that it has interpreted, according to the judicial decision the same legal weight as the statute itself (Burnham, 2002, pg. 40). The principles of *stare decisis* and the importance afforded to cases that

interpret enacted laws reveal that an important goal of the judicial system is both to decide the cases before it and to publicize those decisions so that they may be followed in future controversies.

The Dissemination of Court Opinions

Historically

Court opinions have, for the majority of history, been restrained to two mediums: the spoken and the written word. While oral orders still are still issued, the vast majority of court opinions today are handed down in writings. Those writings have, for the majority of U.S. history, been published in case reporters. The most established case reporter system in the U.S., West Publishing's National Reporter System, was developed in the late 1800s (Mills, 2008/09, pg. 918). It is important to note here that the National Reporter System has not been adopted as the *official* reporter for the lower federal courts (Burnham, 2002, pg. 73). However, the West Reporters have over time become the primary and indeed the preferred method of access to lower federal court decisions.[1] These include West's Federal Reporter, in which decisions of the federal courts of appeals selected for publication are published,[2] West's Federal Supplement, in which decisions of the federal district courts selected for publication are published, West's Federal Rules Decisions, in which cases dealing with the rules of federal procedure are published, and to some extent West's Federal Appendix, in which select unpublished decisions of the federal courts of appeals are published.

The National Reporter System, in addition to other, official case reporters such as United States Reports which is published by the U.S. Government Printing Office, made

finding and citing copies of court opinions easy; so long as the researcher had access to the appropriate print volumes, she could be confident in basing legal decisions on or citing to a court the information contained therein.

On the Internet

Then the Internet changed everything (Johnson, 1998). The federal government began putting documents online in the 1990s, and many federal agencies had their own Websites by 2000 (Kelly & Tastle, 2004, p. 167, 169). While the courts were not the first branch of government to make effective use of the Internet, it was quickly recognized as a natural solution to the problems of rapidly growing case loads and the accumulations of paper those cases produced (Kelly & Tastle, 2004, pg. 169). The U.S. Administrative Office of the Courts acknowledged the ability of the Internet to provide far greater numbers of people with access to courthouse information, announcing in 2001 that "the advancement of technology has brought the citizen ever closer to the courthouse" (Martin, 2008, pg. 855).

E-Government Act of 2002

The federal government's recognition of the importance and impact of the Internet resulted in the United States Congress' 2002 passage of the E-Government Act, which sought to "estab[lish] a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes" (E-Government Act of 2002). In this vein, the E-Government Act requires that, among other things, federal courts make available online

either through their own Websites or by linking to other Websites "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 format" (E-Government Act of 2002).

Federal Courts and the Internet

The federal courts are flooded with filings every year. In 2008, over 60,000 appeals were filed in the federal courts of appeals and over 300,000 cases were filed in the federal district courts (Administrative Office of the Courts, 2009). By supporting a system for electronic case filing and document storage, the Internet has undoubtedly allowed for far greater efficiency in both managing such tremendous case loads and in locating case information and opinions (Kelly & Tastle, 2004, p. 169). In addition to developing a system for electronic filing of court documents (Charles, 2005), the U.S. Judiciary has also created two web-based methods for distributing information to the public: PACER and individual court Websites.

PACER

Public Access Court Electronic Records, or PACER, is a system that was developed by the U.S. Judiciary in 1990 (Martin, 2008, pg. 860). PACER was moved online from a dial-up system in 1998 (Martin, 2008, pg. 861) and provides both litigants and the general public with Internet access to filings in the federal courts of appeals, federal district courts, and federal bankruptcy courts (http://www.pacer.gov). While PACER satisfies the mandates of the E-Government Act, it requires that a person

interested in searching and viewing federal court documents create a user account and charges nominal fees to view and print documents. To create a user account, a member of the public must provide her name, mailing address, phone number, email address, and, for same day registration, her credit card information (PACER – Case search only registration, n.d., para. 1). The fees for viewing documents, which at the time of this paper amount to $.08 per page (PACER – Case search only registration, n.d., para. 2), are said to be "nominal" and roughly equivalent to the fees that a public patron would be charged to make photocopies from a paper file housed at the court (Charles, 2005, p. 24). Notably, all documents designated as court opinions on PACER may now be viewed without charge ("Judiciary Approves PACER Innovations," 2010).

Federal Court Websites

Often ignored avenues of access to federal court opinions online are the individual Websites of the federal courts. Many federal courts have had Websites online for roughly a decade (Martin, 2008, pg. 862 n. 28), and in addition to providing general information about the court, some court Websites have also endeavored to provide access to case opinions (Kelly & Tastle, 2004, p. 170). Searching for opinions on federal court Websites requires no registration and the user is charged no fees for viewing, downloading, or printing the documents. Indeed, "[s]ome of the most overlooked sources of case law on the Internet are official court Websites" (Dansak & Rao, 2009, p. 6).

The growth and development of PACER has caused many federal court Websites to discontinue posting opinions to their Websites, but many other federal courts have chosen to continue to provide the public with easy access to at least some of their

opinions online. The Southern District of Alabama, for example, cites the important "policy that all members of the public . . . should have equal access to materials designated for publication" and that a court-hosted Website, ostensibly in contrast to the more expansive PACER system, is the "most expeditious and efficient means of providing such access" ("Southern District of Alabama Opinions," n.d.).

Privately Maintained Websites

In addition to government efforts to provide citizens with access to federal court opinions online, the private sector has also endeavored to utilize the Internet to provide online access to primary legal materials. West and Lexis, the two powers of the legal print publishing world, entered the Internet age in its infancy by taking their dial-up, computer assisted legal research services and placing them online (Mills, 2008/09, pg. 923-928). This allowed subscribers to Westlaw and Lexis Nexis the ability to access online all case opinions that would have normally been accessible only in print (Grossman, 1994, pg. 81-87).

Later, other groups followed suit and began to provide online access to court opinions as well. These include other subscription Websites such as Loislaw as well as open access Websites such as Justia (Mills, 2008/09, pg. 929; http://www.loislaw.com/; http://www.justia.com). While sophisticated search functions and access to secondary sources and case commentary are limited to subscription Websites like Westlaw and Lexis Nexis (Dansak & Rao, 2009, pg.6), it can be said with certainty that access to case materials has vastly increased with the continued growth and expanded reach of the Internet.

Authentic Primary Legal Materials

> "Judge made law," is as much the law of the land as the Acts of the Legislature, and is, on principle, entitled to the same publicity."
>
> *Report on the Committee on Law Reporting of the Association of the City of New York (1873)* (Grossman, 1994, pg. 58)

It is with this premise in mind that the problem of authenticity begins. As discussed above, case law constitutes a large and vital portion of the American legal system, and increased access to that ever-growing body of case law is an important endeavor. However, it matters much less that greater access to primary legal materials has been provided, be it via the Internet or any other forum, if the materials provided are not in fact true representations of the actual documents.

With the barrage of information on the web, questions have begun to arise as to the trustworthiness of online information. When Internet information is relied upon for casual or curious research, the consequences of misinformation can certainly be detrimental, but that detriment is often arguably minor.[3] For example, a Google search to discover the latest celebrity gossip may lead the researcher to unverified, inaccurate information. While this misinformed reader might now have the wrong idea about who is dating whom in Hollywood, such a mistake probably has no dire implications and will likely be corrected upon discovery of a more reliable source.

In the context of judicial opinions and other primary legal materials, however, authenticity is critically important. For legal researchers, dependence on information that is not trustworthy or information for which there is no verifiable origin could lead to highly detrimental results. For example, reliance on inaccurate authority in a legal brief

could lead not only to losing the motion, but possibly to sanctions[4] or malpractice allegations as well. Additionally, a Website that has posted an unauthenticated, inaccurate court opinion may or may not discover the error and correct it in a manner that would alert researchers who had relied on the information that their source was no longer valid.

Literature Review

As more and more government information is distributed on the Internet, access to, and perhaps interest in, that information has increased as well. With increased access, a myriad of related considerations arise, including public vs. private maintenance (Robinson, Zeller & Felten, 2009), privacy (Silverman, 2004), and, the subject of this paper, authenticity. The authenticity of government documents, court documents in particular, made available online is a growing topic of discussion and concern among government officials, librarians, and researchers. In order to provide a basis for understanding the current discussion surrounding authenticity of court documents online, this literature review will address the following topics: the development of access to legal information on the Internet generally, the definition of authenticity in the context of online documents, the importance of authenticity of online primary legal materials such as court opinions, and the status of other online authenticity efforts.

Online Access to Legal Materials, Generally

In 1999, at a time when the Internet was still developing, Cornell University Law School professor and co-founder of Cornell University's influential Legal Information

Institute Peter Martin wrote an article that previewed the implications of the ability to access the law on the Internet (Martin, 1999). In that article, Professor Martin discusses the impact that innovations in communication such as the printing press have had on the practice of law throughout history, noting that "[l]aw that fails to reach the majority of the individuals it affects is, as a consequence, mostly dead letter" (Martin, 1999, p. 188).

Martin discusses how digital information has emerged as the latest chapter in the history of legal communication, and that, while it may provide for "[g]reater potential for direct government/citizen interaction" and "[m]ore direct and more effective communication of law to those directly affected," such benefits can be dependent on the actions of government, an infamously unhurried entity that is regularly entangled by bureaucracy (Martin, 1999, p. 202-205).

While Professor Martin's predictions about a slow government response to the Internet age were correct (Kelly & Tastle, 2004, 167), the federal government nevertheless ventured on to the Internet and has not turned back. Indeed, during his election campaign, President Obama touted the benefits of the Internet and "endorsed 'making government data available online in universally acceptable formats'" (Robinson et al, 2009, pg. 160). The questions that surround government materials now have less to do with whether they will be available online and more to do with how they will be managed (Martin, 2008) and who best to manage them (Robinson et al, 2009).

Almost a decade after his article that predicted the great migration of government information to the Internet, Professor Martin wrote again to assess the status of access to court opinions online (Martin, 2008). In *Online Access to Court Records – From Documents to Data, Particulars to Patterns*, Professor Martin examines the PACER

system and its effect on and furtherance of a goal of increased access, and contrasts it to the less centralized systems in place in the state courts (Martin, 2008). Notably, Professor Martin discusses the prevalence of "information intermediaries" that mine PACER for documents and redistribute them on non-government Websites (Martin, 2008, pg. 885). While this certainly furthers the goal of increased access to court opinions and documents, it also raises questions and concerns, not addressed in Professor Martin's article, about the provenance of primary law documents as they are retrieved and disseminated across the web.

Authenticity Defined

Kelly Kunsch recognized in the mid-1990s that the dissemination of government information on the Internet would raise authenticity concerns (Kunsch, 1997). In examining the bases for authenticity of online documents, Kunsch defines authenticity as encompassing the concept that a "document is, in fact, what it appears or purports to be" (Kunsch, 1997, 754). Kunsch also notes that three fundamental concepts must be considered when examining the authentication of online documents: the origin of the document, the integrity of the document, and the currency, or date, of the document (Kunsch, 1997, pg. 754-755).

For the purposes of this paper, the term authentic in the context of court opinions and other primary legal authority will also be deemed to encompass the following additional concepts: accuracy, reliability, and cite-ability. Being able to access accurate primary legal information online has obvious benefits: media are able to report correct information about a case or the passage of a law, citizens may gain a true understanding

of what the law actually is, and lawyers and judges may make well-informed decisions based in law.

The idea of reliable primary legal information is addressed by two constructs: trustworthiness and permanence. Sources that elicit the public's trust are those that are both accurate and authoritative. Frederick Schauer, in examining American legal citation practices, details the concepts that inform our current understanding of legal authority (Schauer, 2008). He notes that much of what has long been considered authoritative in the law derives from notions of content independence, wherein the "reasons to act, decide, or believe . . . are based not on the substantive content of a reason, but instead on its source" (Schauer, 2008, pg. 1935-6). In a time when only print materials were available, concerns about source authority may have been less significant; while typographical errors and other errata could certainly affect the accuracy of a print source, the National Reporter System and other, official reporters comprised the authoritative source of case law that lawyers, judges, and lay-users could rely upon exclusively (Mills, 2008/09, pg. 918). Times have changed, however, and lawyers and judges may look to any number of sources to find case law. While the accuracy and authority of an independent Website might not be readily verified, the documents presented on the Website of the court that issued the opinion should be able to be relied upon as both accurate and authoritative.

While permanence is an important aspect of trustworthiness that has unique considerations in online applications, the topic of this paper is limited to examining the authenticity of online court opinions, not their accessibility and stability over time.[5]

Cite-ability refers to whether or not lawyers and lawmakers are able to cite or refer to a document in official filings or papers, including motions, memoranda, and opinions filed by the court. While some states have adopted neutral citation format schemes, wherein citations of court opinions are no longer solely dependent upon or founded in the official or unofficial print reporters, and such practice has been endorsed by the both the American Bar Association and the American Association of Law Libraries, the federal judiciary has thus far refused to adopt a neutral citation format (Martin, 2007, pg. 329-330; 352). Practically speaking, this means that, for the most part, federal court opinions discovered on court Websites must be verified in another official or unofficial but sanctioned source before citation to the information is appropriate.

Taken together, the considerations of accuracy, reliability, and cite-ability provide a basis for understanding of the importance of authenticity with regard primary legal materials. Without authenticity, the power of increased access to legal materials is diminished. In the context of legal opinions, where authenticity is paramount to legal professionals, recent efforts made by the federal government and the courts to provide increased access are in some ways futile unless further steps are taken to ensure authenticity.

Importance of Authentication of Court Opinions Online

In his article titled *The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age*, Frederick Mills recognizes that as more information moves online, the legal community must accept that the online

materials, including online versions of court opinions or state statutes, will be the only version of that information relied upon by lawyers and judges (Mills, 2008/09, p. 934).

> To an overwhelming degree, when today's lawyers research case law they do so through the use of electronic databases on the Internet. ... To what extent should we expect that lawyers who retrieve case reports from Internet sources will verify the fidelity of those documents to the print versions before citing them? (Mills, 2008/09, p. 933).

Mills describes that while West Publishing gained the legal community's implicit trust after decades of publishing court opinions, the presence of the Internet has changed the landscape of legal research to the degree that a new trustworthy source of authentic primary legal materials must be generated (Mills, 2008/09). If Mills is indeed correct in stating that the legal community has begun to rely in effect exclusively on Internet sources, then it behooves the government branches that provide this information to allow their users to ensure that it is authentic material.

Other Authenticity Efforts

Opinions offered by individual courts on their Websites are affected by many of the same issues that confront all government documents on the web, namely "accuracy, authentication, and preservation" (Foreman, 2009). Most pertinent to this discussion are authors who have recognized the need for some standard of authentication of online government documents, particularly those who recognize the unique circumstances presented by online court opinions.

AALL Study

Authentication of online government documents has been heavily discussed in the literature with regard to state materials, including the availability of state laws, state administrative codes, state judicial opinions, and other primary state legal materials. A comprehensive study by the American Association of Law Libraries (AALL), the *State-by-State Report on Authentication of Online Legal Resources (State-by-State Report),* sought to capture the landscape of state materials online as it existed in 2006 (Matthews & Baish, 2007). With the assistance of law librarians in each of the fifty states, the AALL authors compiled information about the availability of state primary legal materials online, whether those online sources were considered official, and whether the online documents were authenticated (Matthews & Baish, 2007, p. 3). The AALL study defined official to mean "[a source] that has been governmentally mandated or approved by statute or rule" and authentic to mean "[a document] whose content has been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator" (Matthews & Baish, 2007, p. 8).

The authors found that while a number of states maintained official online versions of primary legal materials, none of those states had taken measures to authenticate these documents (Matthews & Baish, 2007, p. 7). Most disturbingly, a few states have made the online versions of select primary legal materials the *only* version available, meaning that lawyers, lawmakers, and the general public no longer have any access to copies of state statutes or administrative codes that are both official and authenticated (Matthews & Baish, 2007, p. 10). For example, Indiana, Tennessee, and

Utah no longer print official versions of their administrative codes; the only official version is now published online (Matthews & Baish, 2007, pg. 10).

Shortly after its publication, a judge on the District of Columbia Superior Court wrote in response to the AALL survey, highlighting the unique concerns of the legal community to online documents (Dixon, 2007). In his article, Judge Dixon poses the same questions that are meant to be addressed by this paper: namely, if "the trustworthiness and integrity of resulting research are inherently a matter of great concern to anyone seeking legal information online," (Dixon, 2007, pg. 43), how is that trust earned and integrity maintained if the government sources making the information available fail to provide measures for authentication of these documents?

Judge Dixon points to at least one possible solution to the authentication problem: requiring courts and government entities that place opinions online to comply with the "aspirational" provisions of Standard 1.65 of the Federal Information Processing Standards,[6] which encourages enhanced security measures and a "means to verify that a document purporting to be a court record is in fact identical to the official court record" (Dixon, 2007, pg. 45). Judge Dixon correctly notes that what was appropriately aspirational ten or even five years ago is now, in light of the increased utilization of the online storage and distribution of information, reasonably appropriate and necessary.

In another response to the AALL *State-by-State Report*, Carol Ebbinghouse reviews the data collected by AALL and stresses the risks associated with the arguably beneficial effect of increased access to primary legal materials online (Ebbinghouse, 2007). Emphasizing that the moral of the AALL story is "[d]ouble-check your

information on more than one site to verify it," (Ebbinghouse, 2007, pg. 46), Ebbinghouse also considers AALL's response to its own survey.

In the spring of 2007, AALL convened a National Summit on Authentic Legal Information in the Digital Age which sought input and comment from a wide variety of legal information researchers. Ebbinghouse writes that Summit attendee Professor Berring stressed "the importance of cognitive authority and how digital legal information must gain the trust of users of legal information before print resources can disappear" (Ebbinghouse, 2007, pg. 50). The AALL National Summit has continued to work to address the authentication issue, including making recommendations to the National Conference of Commissioners on Uniform State Laws and updating its pioneering 2007 report (Ching, 2010).

Federal Government Authentication Initiatives

In 2008, an article in Government Information Quarterly described the U.S. Government Printing Office's (GPO) efforts to respond to the Internet age. (Priebe, Welch, MacGilvray, 2008). GPO, which has been printing the documents produced by the federal government since 1861 (MacGilvray, 1986), set out to implement a new online system that would "ingest digitized, harvested, and submitted content; verify and track versions; assure authenticity; and provide permanent public access" (Priebe et al, 2008, pg. 49). This new system, called FDsys or Future Digital System,[7] includes specific authentication measures designed to ensure that the public has online access to verified, unaltered versions of federal documents, including primary legal materials (Priebe et al, 2008, pg. 50). In addition to detailing the specific methods of

authentication to be employed by GPO, including Public Key Infrastructure and seals of authenticity, the authors highlight the importance of GPO's efforts, noting that "[e]nsuring customers that the U.S. Government information made available through GPO is official and authentic is of paramount importance for the future" (Priebe et al, 2008, pg. 50-51).

In a white paper addressing the topic of authentication, GPO in 2005 couched the issue in the following terms: "'authentic' is defined as content that is verified by GPO to be complete and unaltered when compared to the version received by GPO" (U.S. GPO, 2005, pg. 5). GPO differentiates the terms authentic and official, assigning to the latter the notion that official status is determined by the source of the document or another source outside of GPO, whereas authentication is an internal determination made by GPO to assure end-users that the content presented is exactly as it was received (U.S. GPO, 2005, pg. 5).

This distinction is an important one, and one that was followed by AALL in its *State-by-State Report*. Most notably for this paper, authentication as it has been defined by the GPO is something that can be achieved and ensured by the host of each Website that provides access to primary legal materials. That is, whether an opinion placed online on a court-hosted Website is deemed the official version is a separate inquiry. Whether the court has taken the extra steps necessary to ensure their users that the opinion available online is the same opinion actually signed by the presiding judge is a measure within the control of the individual court.

FDsys was introduced online in January 2009, and currently provides access to authenticated documents from more than half of the GPO's collection of documents

(Latham, 2010). These collections include public and private laws, the compilation of presidential documents, and Congressional bills (http://www.gpo.gov/fdsys). GPO's achievement on FDsys is a laudable one, and, as noted by Priebe, Welch, and MacGilvray, should serve as inspiration and guidance for other government entities when providing access to materials online (Priebe et al, 2009, pg. 25).

Methodology

The purpose of this study is to examine the current state of authenticated federal court opinions on the Internet. Three avenues exist to accomplish this goal, but only one was selected for this study due to time restraints. First, a detailed examination of PACER documents could be conducted. Second, a survey of private Websites, including Justia, FastCase, LexisNexis, and Westlaw could be conducted. Third, a survey of individual federal court-hosted Websites could be conducted. The third option was chosen for this study for a variety of reasons.

Federal court Websites are created and maintained by each individual federal court (E-Government Act of 2002), allowing for the possibility of great variance in the materials they provide and the manner in which those materials are provided. For those practicing or researching law, court-hosted Websites can provide a great deal of relevant information without requiring the creation of user accounts or the incurrence of fees for viewing or printing documents. Additionally, and perhaps most importantly, unlike private Websites providing access to federal court opinions, court-hosted Websites imply by their very nature that the information located on the Website has been approved or sanctioned by the court.

After determining to conduct a survey of federal court-hosted Websites, federal bankruptcy court Websites were excluded from the sample. This was done for two reasons: first, to include the bankruptcy courts would create a sample size too large given the time constraints of this study, and second, bankruptcy courts face unique issues with regard to online case information, including but not limited to special privacy concerns. All courts, state and federal, have had to balance the interests of privacy and access when placing case information online (Silverman, 2004; Lyons, 2009), and those concerns have been recognized as especially pertinent in the bankruptcy context.[8] Also excluded from the sample due to time constraints were the federal courts of special jurisdiction, such as the U.S. Court of International Trade, the U.S. Tax Court, and the U.S. Court of Appeals for the Armed Forces. The sample surveyed for this paper thus contains the court-hosted Websites of all federal district courts, the federal appeals courts, and the U.S. Supreme Court.

There are ninety-four federal district courts and thirteen appellate courts, including twelve regional appellate courts and the Court of Appeals for the Federal Circuit, and one U.S. Supreme Court. Each of these courts, in compliance with the E-Government Act of 2002, maintains its own Website (E-Government Act of 2002). The Websites maintained by each of the courts were surveyed beginning in September, 2010, and the surveys were completed by November 15, 2010. The individual court Website addresses were located by performing a Google search.

The following information was collected by the author with regard to each court Website visited: whether or not the court offers opinions on its Website; whether or not those opinions are authenticated; whether the court Website instructs users as to the

criteria used in determining which opinions will be made available through the Website; whether or not the court Website provides any specific disclaimer as to the accuracy of opinions located on the Website; and whether the court provides users with rules regarding the citation of opinions located on the court-hosted Website.

These factors were chosen as most illustrative of individual court positions as to the importance and necessity of providing the public with access to authoritative case law generated by its judges. Many of these factors were informed by the AALL *State-by-State Report on Authentication of Online Legal Resources*, most specifically the criteria for determining whether an opinion has been authenticated (Matthews & Baish, 2007). The AALL authors premised the authentication criteria for their study of online state primary legal materials on a white paper issued by the U.S. GPO, which defines authentication to include evidence of encryption, digital signatures, or digital watermarking (Matthews & Baish, 2007, pg. 9). Accordingly, this study examined opinions provided on court-hosted Websites for evidence of these types of authentication measures, using the authentication evidence provided by GPO on its Website FDsys.gov as guidance. (Appendix A). Opinions were also searched for other indicia of verification measures, which for the purposes of this study are defined to include visible watermarks or other imprints not easily reproducible, but not case numbers or file-stamps.

The first factor considered was whether the court provided access to any court opinions on its Website. For the purposes of this study, access to court opinions is defined only to include no-cost, direct access to opinions via the court Website; links to PACER or subscription services were not considered in this study. This definition is, however, broad enough to include courts that post opinions to outside Websites that host

opinions from several different courts, so long as access is not hinged on fee or non-fee based subscription. This definition also includes courts that do not provide access to all court issued opinions, but rather limits access to recent rulings of interest or opinions filed in large, multi-district or class action lawsuits.

If possible, a minimum of three opinions on each court Website were accessed to determine whether authentication measures have been undertaken by the court. A range of dates and authorship were included to ensure that each of the opinions provided the same level of authentication information. Disclaimer information was considered to be relevant to this study if it included specific information about court opinions provided or was located on the webpage that housed court opinions; general disclaimers, often located in small print on the home page of the Website, were not included in this study.

Also recorded were any criteria listed to indicate which opinions are posted to the Website. This includes information such as whether all filed opinions are posted as opposed to opinions selected by judges, opinions within a certain range of dates, or opinions in certain types of cases. Whether or not the court had included rules or guidelines about citation to the opinions found on its Website was also considered.

Results & Discussion

United States Supreme Court

The U.S. Supreme Court (Supreme Court) offers access to court opinions on its Website; specifically, the Supreme Court provides access to slip opinions until those opinions are printed in the bound volumes of the United States Reports as well as access to PDF format copies of entire bound editions of U.S. Reports from 1991 to 2006

("Supreme Court Opinions," n.d.). The Supreme Court offers detailed explanation of the criteria for posting opinions to its site, including a notice concerning corrections that take place as opinions evolve from bench opinions to slip opinions and then to final official print opinions. A disclaimer on the Supreme Court Website provides that the bound reporter is the official version and will control should any discrepancies arise, but the Supreme Court does not provide any general citation rules for opinions located on its Website. Each opinion posted does, however, contain the following information: "[c]ite as: 561 U.S. ____ (2010)," [9] referring the user to the official citation that will be used once the opinion is published in the U.S. Reports. The Supreme Court does not take any visible measures to authenticate any opinions located on its Website. (Appendix B).

Courts of Appeals

All thirteen of the U.S. Courts of Appeals offer access to opinions on their court-hosted Websites. Three courts provide criteria to inform the public of which opinions are provided, one court provides a disclaimer as to the opinions posted, no courts provide rules regarding citation of opinions located on their Websites, and no courts take any visible measures of authentication of opinions provided on their Websites. (Appendix C).

District Courts

Of the ninety-four U.S. District Courts, fifty-two courts provide access to at least some opinions on their court-hosted Websites. Thirty of those district courts provide the criteria considered in selecting opinions to post, and eighteen courts provide disclaimers as to the opinions posted on their Website. Five district courts have posted rules

regarding citation to court opinions, and none of the U.S. District Court Websites take any visible measures of authentication of opinions provided on their Websites. (Appendix D).

The district court Websites varied greatly as to their content and sophistication, but one stood out from the rest as being the most user-informative regarding the online opinions of the court. In addition to providing information about when the court began posting opinions on its Website and why, the U.S. District Court for the District of New Hampshire Website directs users of the opinions page to Local Rule 5.3 that addresses the citation of the opinions found therein ("District of New Hampshire Opinions," n.d.). Specifically, Local Rule 5.3 provides that all published opinions should be cited as they appear in West's Federal Supplement, while all unpublished opinions found on the court Website may be cited to in the following format:

> the four-digit year in which the opinion is issued, the letters "DNH," the three-digit opinion number located below the docket number on the right side of the case caption and, where reference is made to specific material within the opinion, the page number that appears in the Portable Document Format (PDF) version of the opinion that is available on the court's web site, e.g., United States v. Smith, 2000 DNH 001, 6.
> ("District of New Hampshire Local Rule 5.3," 2001).

While a Local Rule that addresses citation to opinions housed on the court's Website does not by any means provide for or indicate efforts to ensure authenticity of online court opinions, it does stand for the proposition that at least some individual federal courts do, or are beginning to, recognize that the information they provide to the public is being relied upon to the degree that it may appear in briefs or motions presented to the court. Recognizing that a legal researcher might turn to searching a court Website instead of the National Reporter System is a first step in understanding that information

provided by government agencies should serve more than an information-only function (Matthews & Baisch, 2007, pg. 7). Additionally, citation rules that address opinions posted on a court Website can also be seen as an implicit recognition of the authority that is implied by the mere fact that an opinion appears on the Website of the court that issued it; if the court issuing the opinion cannot verify that the opinion is authentic, who can?

The results of this survey are similar to the results of AALL's 2007 *State-by-State Report* in that, while some federal courts are providing access to court opinions online via their Websites, none of the federal courts surveyed has endeavored to authenticate the opinions they post. Although the results of this survey are arguably unsurprising, they highlight the fact that government sources that should be deemed trustworthy are in fact taking few efforts to maintain the public's trust. Indeed, even opinions that appear on PACER, the U.S. Judiciary's primary method of providing reliable electronic access to federal court opinions, are not authenticated.

Difficulties Faced & Suggestions for Change

This paper has focused on opinions that appear on federal court-hosted Websites, specifically those of the federal district courts, courts of appeals, and the U.S. Supreme Court. As mentioned above, each of these Websites was developed and is maintained by the individual court; there is no overarching system within the U.S. Judiciary that dictates the how individual court Websites are designed and what information is provided by them.[10] As such, any authentication measures undertaken by courts may result in piecemeal application of disparate methods and results. It may arguably be more effective for the U.S. Judiciary to adopt a single method of authentication of court

opinion and require that all federal courts posting opinions on their Websites follow the prescribed protocols. This could, however, result in individual courts discontinuing their efforts to post opinions online, outside of the PACER system, due to the additional requirements.

To avoid this outcome, the U.S. Judiciary could instead direct that PACER begin to authenticate any opinion filed on its system. This would ensure that what is increasingly the primary mode of access[11] to online federal court opinions is in fact providing the public with authenticated documents. Authenticating PACER documents would also provide for a more streamlined, directed approach to authentication; as opinions are uploaded to the PACER site, the PACER infrastructure would take the steps necessary to ensure that the document published on the web is in fact the document issued by the court and submitted to PACER.[12]

Suggestions for Further Research

Further research is required in order to gain a more complete understanding of the authentication problem as it applies to the federal courts. At a minimum, a more detailed examination of the entire PACER system would need to be considered, in addition to examining the remaining court Websites not reviewed by this study (the U.S. Bankruptcy Courts and the courts of special jurisdiction).

Additionally, a detailed study of GPO's FDsys authentication system could be conducted, with the goal of assessing its applicability to a system such as PACER. Finally, an examination of competing ideas for access could be conducted. If authentication measures cannot be easily integrated into the PACER system or court-

hosted Websites, perhaps the most efficient way to build an authenticated online database of federal court opinions would be to construct a new system. Carl Malamud's Law.gov project suggests that all primary legal materials should be made available online for free (Ard, 2010). Malamud, at whose urging patent documents and Securities and Exchange Commission documents were made available at no cost online, argues that access is paramount in our legal system, and that the existing cost-barriers to online legal research should be removed (Markoff, NY Times, 2007). If Mr. Malamud or a group like his is successful in convincing the federal government to redesign how federal court opinions are disseminated online, it will remain critically important that a method of authentication of these documents is included in the new system.

Conclusion

Unfortunately, while the federal courts have made a commendable effort to provide online access to court opinions, both through PACER and individual court-hosted Websites, none of the avenues of access provided lead users to court opinions that are authenticated. This means that while lawyers and lay-users may utilize free or low cost methods to locate case law, they must still verify that information in one of the sanctioned or official reporters before they may rely on it. In pertinent fact for practicing attorneys, one author has found that federal "[c]ourts continue to point to print editions as the exclusive sources for authentic versions of their opinions, and they are generally unwilling to stand behind the accuracy of these opinions as rendered on the Internet, even on Websites that the courts themselves produce" (Mills, 2008/09 pg. 935). This requires duplication of efforts for anyone needing access to authentic, trustworthy, even if not official, court opinions.

Fortunately, however, AALL has shown that attention to the issue of authentication is in some cases enough to catalyze change. In an update to the 2007 *State-by-State Survey*, AALL reports that several states have undertaken measures to either ensure authenticity or at a minimum to provide users with further information regarding official versions of materials (Ching, 2010, pg. 2). This information, considered in light of the admirable efforts undertaken by the U.S. Government Printing Office to ensure authenticity, is good evidence that as judicial bodies begin to recognize the importance of and need for authenticated online court opinions, they will be willing to utilize the tools available to provide such assurances to the public.

Notes

[1] For example, Local Rule 7.2(b)-(d) from the U.S. District Court for the Eastern District addresses citation to published and unpublished decisions:

> (b) Citation of Published Decisions. Published decisions cited should include parallel citations (except for U.S. Supreme Court cases), the year of the decision, and the court deciding the case. The following are illustrations:
>
> (1) State Court Citation: Rawls v. Smith, 238 N.C. 162, 77 S.E.2d 701 (1953).
> (2) District Court Citation: Smith v. Jones, 141 F. Supp. 248 (E.D.N.C. 1956).
> (3) Court of Appeals Citation: Smith v. Jones, 237 F.2d 597 (4th Cir. 1956).
> (4) United States Supreme Court Citation: Smith v. Jones, 325 U.S. 196 (1956).
> United States Supreme Court cases should in accordance with current Bluebook form.
>
> (c) Citation of Decisions Not Appearing in Certain Published Reports. Decisions published outside the West Federal Reporter System, the official North Carolina reports, the official United States Supreme Court reports, LexisNexis, and Westlaw (e.g. CCH Tax Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited if the decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed.
>
> (d) Citation of Unpublished Decisions. Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. The unpublished decision of a United States District Court may be considered by this court. The unpublished decision of a United States Circuit Court of Appeals will be given due consideration and weight but will not bind this court. Such unpublished decisions should be cited as follows:
> United States v. John Doe, 5:94-CV-50-F (E.D.N.C. January 7, 1994) and
> United States v. Norman, No. 74-2398 (4th Cir. June 27, 1975).
> ("Eastern District of North Carolina Local Rule 7.2," 2010).

[2] Federal appellate and district court judges have sole discretion in deciding which of their opinions should be published in the National Reporter System and which should remain unpublished (Grossman, 1994, pg. 84). Unpublished opinions may still be disseminated, although, until the enactment of Federal Rule of Appellate Procedure 32.1,

many courts did not allow litigants to cite to opinions that may have been disseminated but were not marked for publication by the presiding judge (Allen, 2005, pg. 557).

[3] While this example touches on a relatively harmless scenario, there are many other situations in which misinformation located online can be highly detrimental. These included, but are not limited to, health information, historical information, and news information (Ebbinghouse, 2000; Fitzgerald, 1997; Morhan-Martin & Anderson, 2000).

[4] Rule 11 of the Federal Rules of Civil Procedure provides that sanctions may be imposed on counsel who makes "claims, defenses, and other legal contentions [not] warranted by existing law" before the court (Fed. R. Civ. Pro. 11).

[5] For further discussion of permanence issued, see Special Committee on Permanent Public Access to Legal Information. (2005). Permanent public access to legal information. *AALL Spectrum, 10*, 1-4.

[6] The Federal Information Processing Standards Publications Website provides the following information about the processing standards discussed by Judge Dixon:

> Under the Information Technology Management Reform Act (Public Law 104-106), the Secretary of Commerce approves standards and guidelines that are developed by the National Institute of Standards and Technology (NIST) for Federal computer systems. These standards and guidelines are issued by NIST as Federal Information Processing Standards (FIPS) for use government-wide. NIST develops FIPS when there are compelling Federal government requirements such as for security and interoperability and there are no acceptable industry standards or solutions. See background information for more details.
> ("General Information," 2008, para. 1).

[7] Other sources state that FDsys is an abbreviation for "Federal Digital Storage" (Latham, 2010).

[8] For further discussion of the privacy issues and online access to court opinions and case information, see Meadows J. & Oakley, B. (2004), Balancing Act: Reconciling Privacy with the Public's Right to Know. *AALL Spectrum 8*(14), 14-15, 35.

[9] This particular citation refers to a slip opinion that will appear in the 561st volume of the U.S. Reports, at a now undetermined page, and that the opinion was handed down in 2010. This information will change as the volume number of the U.S. Reports and the year of issuance changes. For example, an opinion handed down in the 2006 term contains the following information: "[c]ite as 549 U.S. ___ (2006)."

[10] The E-Government Act mandates that courts provide certain information on their Websites, including location and contact information, local rules, and "any other information that the court determines useful to the public" (E-Government Act of 2002).

[11] The PACER Website boasts "nearly 1 million users" (http://www.pacer.gov).

[12] This is similar to the method employed by the GPO on its FDsys Website (Wash, 2009).

References

Administrative Office of the Courts. (2009). *Judicial facts and figures: Mutli-year statistical compilations on the Federal Judiciary's caseload through fiscal year 2008.* Retrieved from http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2008.aspx

Allen, J. (2005). Just words? The effects of no-citation rules in federal courts of appeals. *Vermont Law Review, 29,* 555-610.

Ard, C. (2010). Legal research in the age of open law. *Online, Sep/Oct*, 29-32.

Berring, R.C. (2007). Losing the law: A call to arms. *Green Bag 2d*, *10*, 279-282.

Burnham, W. (2002). *Introduction to the law and legal system of the United States* (3rd ed.). St. Paul, MN: West Group.

Charles, P. (2005). Access to federal case information: PACER and CM/ECF. *Nebraska Lawyer*, 23-25.

Ching, T. (Ed.) (2010). 2009-10 Updates to the state-by-state report on authentication of online legal materials. Retrieved from http://www.aallnet.org.

Dansak, R.L. & Rao, D. (2009). Jurisdictions offer free case law online. *Lawyers Journal, 11*(18), 6.

Dixon, H. B. Jr. (2007). The lack of effort to ensure integrity and trustworthiness of online legal information and documents. *Judges' Journal, 46*, 42-46.

E-Government Act of 2002, Pub. L. No. 107-347, § 205(a), 116 Stat. 2899 (2002).

Ebbinghouse, C. (2000). Medical and legal misinformation on the Internet. *Searcher,*

8(9), 18-35 (even pgs only).

Ebbinghouse, C. (2007) The high risk of free: State law on the web. *Searcher, July/August*, 46-50.

Farnsworth, E.A. (1996). *An introduction to the legal system of the United States* (3rd ed.). New York, NY: Oceana Publications.

Fitzgerald, M. (1997). Misinformation on the Internet: Applying evaluation skills to online information. *Emergency Librarian*, *24*(3), 9. Retrieved from Academic Search Premier database.

Foreman, R. (2009). Digital legal authority: Accuracy, authentication, and preservation. *Michigan Bar Journal, 88*, 19-25.

General Information, Federal Information Processing Standards Publications. (2008). Retrieved from http://www.itl.nist.gov/fipspubs/geninfo.htm

Grossman, G.S. (1994). *Legal research: Historical foundations of the electronic age*. New York, NY: Oxford University Press.

Johnson, S.M. (1998). The Internet changes everything: Revolutionizing public participation and access to government information through the Internet. *Administrative Law Review, 50*(2), 277-337.

Judiciary Approves PACER Innovations To Enhance Public Access. (March 16, 2010). Retrieved from http://www.uscourts.gov/News/newsview/10-03-16/Judiciary_Approves_PACER_Innovations_To_Enhance_Public_Access.aspx

Kelly, E.P. & Tastle, W.J. (2004). E-government and the judicial system: online access to case information. *Electronic Government, 1*(2), 166-178.

Kunsch, K. (1997). Diogenes wanders the superhighway: A proposal for authentication of publicly disseminated documents on the Internet. *Seattle University Law Review, 20,* 749-784.

Latham, B. (2010). The federal digital system. *Reference Reviews, 24*(7). Retrieved from http://www.emeraldinsight.com

Lyons, S. (2009). Balancing access and privacy: Free PACER. *AALL Spectrum, 13,* 30-33.

MacGilvray, D.R. (1986). Our doors swing open. *New Typeline, 2*(3), 3-5.

Meadows, J. & Oakley, B. (2004). Balancing act: Reconciling privacy with the public's right to know. *AALL Spectrum, 8,* 14-15.

Markoff, J. (August 20, 2007). A quest to get more court rulings online, free. *The New York Times, p. C6.*

Martin, P. (1999). The Internet: "Full and unfettered access" to law – some implications. *Northern Kentucky Law Review, 26*(2), 181-198.

Martin, P. (2008). Online access to court records – From documents to data, particulars to patterns. *Villanova Law Review, 52,* 855-888.

Matthews, R. J. & Baish, M. A. (2007). State-by-State report on authentication of online legal resources. Retrieved from http://www.aallnet.org.

Mills, W. R. (2008/09). The decline and fall of the dominant paradigm: Trustworthiness of case reports in the digital age. *New York Law School Law Review, 53,* 917-936.

Morahan-Martin, J. & Anderson, C.D. (2000). Information and misinformation online: Recommendations for facilitating accurate mental health information retrieval

and evaluation. *CyberPsychology & Behavior, 3*(5), 731-746.

PACER – Case search only registration. (n.d.). Retrieved November 26, 2010, from http://www.pacer.gov/reg_pacer.html

Priebe, T., Welch, A. and MacGilvray, M. (2008). The U.S. Government Printing Office's initiatives for the Federal Depository Library Program to set the stage for the 21st Century. *Government Information Quarterly, 25*, 48-56.

Robinson, D., Yu, H., Zeller, W. P., & Felten, E. W. (2009). Government data and the invisible hand. *Yale Journal of Law & Technology, 11*, 160-175.

Schauer, F. (2008). Authority and authorities. *Virginia Law Review, 94*, 1931-1961.

Silverman, G.M. (2004). Rise of the machines: Justice information systems and the question of public access to court records over the Internet. *Washington Law Review, 79*, 174-221.

Special Committee on Permanent Public Access to Legal Information. (2005). Permanent public access to legal information. *AALL Spectrum, 10*, 1-4.

United States District Court, District of New Hampshire, Local Rule 5.3. (2001). Retrieved November 26, 2010, from http://www.nhd.uscourts.gov/ru/local-rules/5.3.asp

United States District Court, District of New Hampshire, Opinions/Orders. (n.d.). Retrieved November 27, 2010, from http://www.nhd.uscourts.gov/oo/

United States District Court, Eastern District of North Carolina, Local Rule 7.2. (2010). Retrieved November 27, 2010, from http://www.nced.uscourts.gov/Applications/FlashHelp/LocalRules.htm

United States District Court, Southern District of Alabama, Opinions. (n.d.).

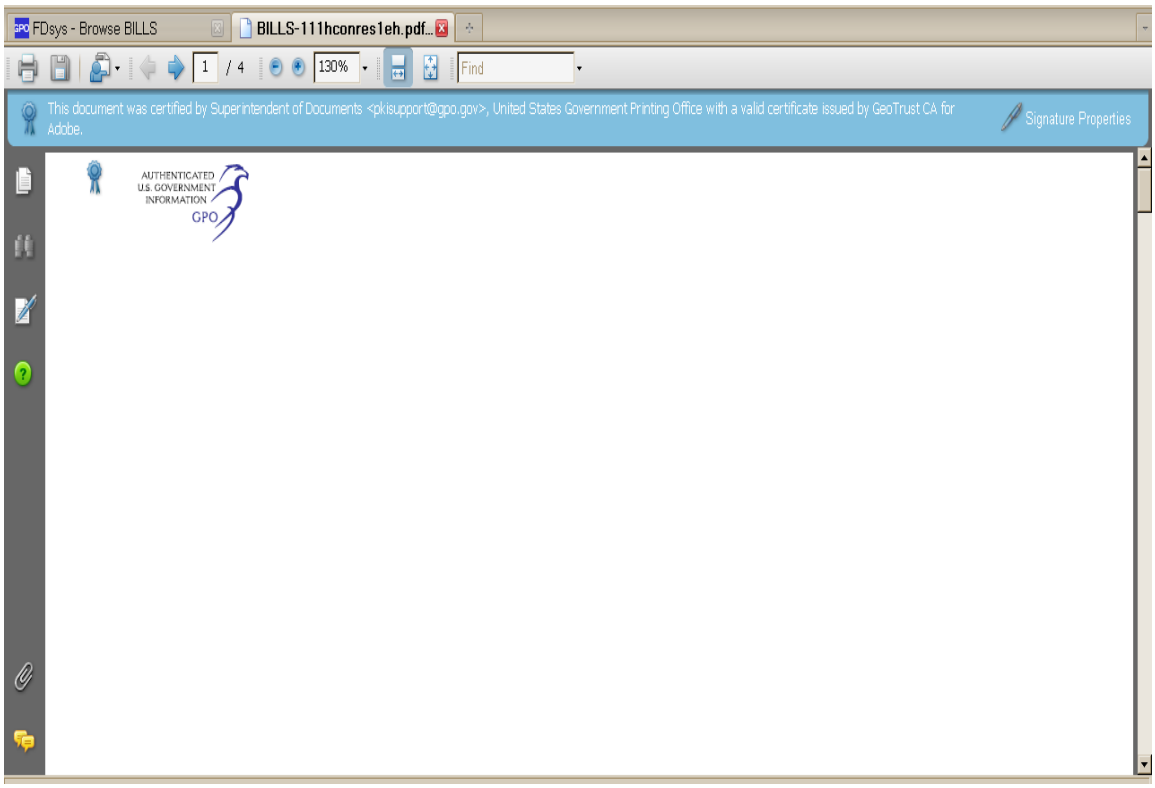
Retrieved November 26, 2010, from http://www.als.uscourts.gov/opinions/

United States Supreme Court, Opinions. (n.d.) Retrieved November 27, 2010, from http://www.supremecourt.gov/opinions/info_opinions.aspx

Wash, M. (2009). *GPO's Federal digital system (FDsys) briefing* [PDF document]. Retrieved November 26, 2010, from http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1003&context=future_scholarship

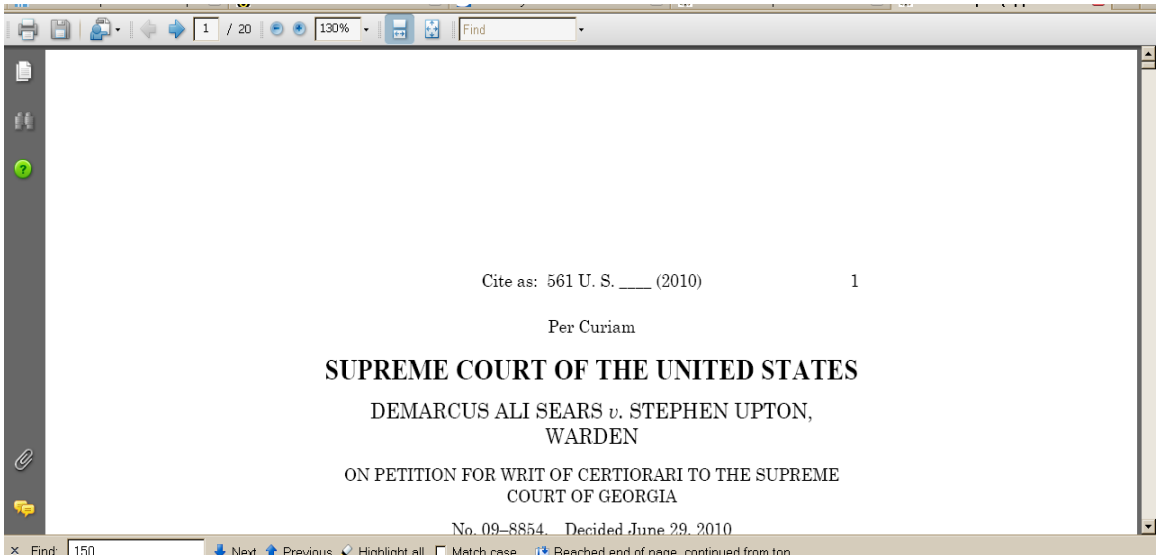
APPENDIX A

Authentication Banner on GPO FDsys



APPENDIX B

U.S. Supreme Court


Cite as: 561 U. S. ____ (2010) 1

Per Curiam

SUPREME COURT OF THE UNITED STATES

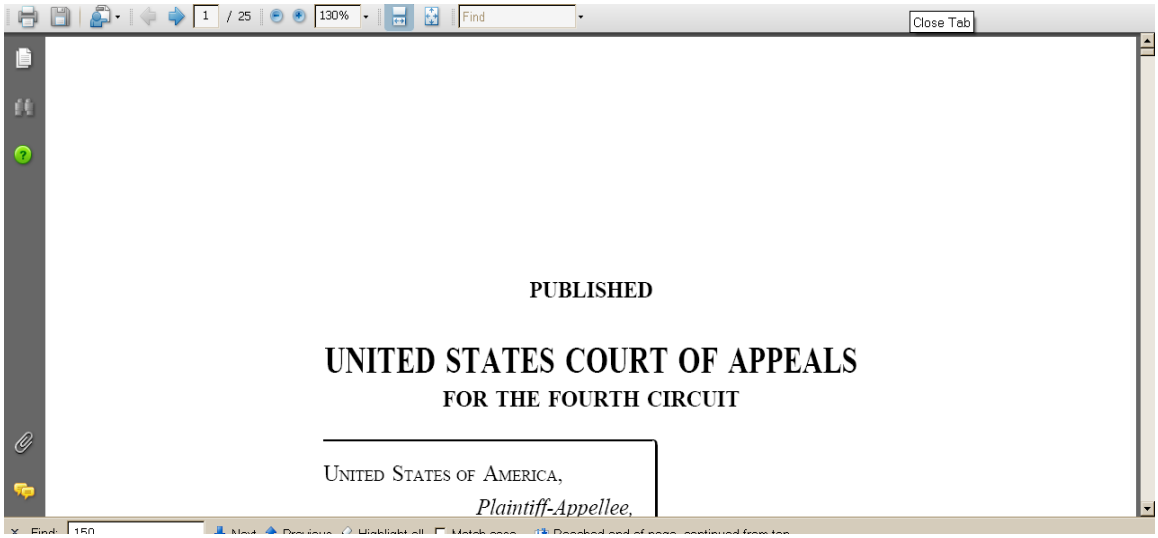
DEMARCUS ALI SEARS *v.* STEPHEN UPTON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 09–8854. Decided June 29, 2010

APPENDIX C

U.S. Court of Appeals, Fourth Circuit



APPENDIX D

U.S. District Court, Southern District of Alabama