

A teal-tinted photograph of a crowd of people holding flags in front of a classical building with columns. The image is used as a background for the report cover.

FIGHTING FOR REAL JUSTICE

**A REPORT ON
ACCESS TO JUSTICE**

Introduction

The American people's ability to win real justice through the courts is under attack. At the urging of wealthy corporations and powerful special interests, members of Congress and the Trump Administration aim to limit access to the federal justice system. These efforts threaten individuals' ability to protect civil rights and liberties, defend consumer and environmental protections, and advance public health and safety.

The federal judiciary is a vital part of the constitutional system of checks and balances. It has helped to ensure that our rights and freedoms are more than just words on paper. Court decisions have protected the right to vote, struck down segregated schools, secured marriage equality, upheld protections for public health and safety, compelled the government to follow the law to clean up our air and water to ensure the safety of food, and to preserve our valuable natural resources.

This abridged report follows our 2018 report, prepared by Earthjustice, with invaluable contributions from the American Civil Liberties Union, Public Citizen, and The Leadership Conference on Civil and Human Rights. This report examines actions of the Trump Administration and Congress that threaten people's ability to have their day in court. These dangerous policies, being pursued at the behest of powerful corporate and ideological interests, seek to diminish the role of the courts in securing important public protections for individuals, workers, families, communities, and the environment, with particularly profound implications for already marginalized groups.

Congress continues to introduce bills that would eliminate or severely limit court access, targeting laws related to environmental protection, workers' rights, public health, consumer rights, and rights and civil liberties. Several federal agencies have also adopted policies, or are proposing policies to limit judicial remedies and to make litigation more expensive. And now increasingly Trump-appointed federal judges are proving receptive to legal arguments that make it harder to get real justice in the courtroom.

Since 2017, the Trump Administration has acted to limit environmental lawsuits and Congress has struck down a Consumer Financial Protection Bureau rule that was designed, in part, to prohibit the financial services sector from forcing their customers into mandatory arbitration without the right to go to court. Other measures threaten cases that seek to address violations of civil rights, environmental laws, workers' rights, or public health and safety protections. They will limit the ability of people in America to hold the government and powerful corporations accountable and undermine courts' ability to serve as a check on the president and Congress.

Among the Congressional proposals, Trump Administration executive actions, and litigation tactics that threaten Real Justice through the courts, we identify five main types of attacks:

- **Making the courts off-limits with "no judicial review" clauses**, eroding the role of courts to hear challenges to certain government actions;
- **Stripping Americans of their individual right to sue**, by expanding the use of forced arbitration (without the right to go to court) and restricting people's ability to bring class action lawsuits;
- Making public interest litigation **too financially risky or too expensive to pursue**;
- **Interfering with judges' discretion** to administer justice and limiting the power of courts to effectively redress injuries; and
- Undermining the government's ability to reach **timely and meaningful case settlements that bring critical relief to people in need**.

The intensity and frequency of these anti-justice attacks has brought together public interest organizations to sound the alarm. Earthjustice stands united with allies from other sectors and movements against any attempts to block the courthouse doors, because every person in America deserves access to justice.



A woman in a dark winter jacket is shown from the chest up, looking upwards and to the right. Her right arm is raised with a clenched fist. Her left hand is gripping a vertical pole that supports a flag with long, flowing white stripes. The top of the flag is a dark, textured shape. The entire image has a teal color cast. The text is overlaid on the upper left portion of the image.

**...THE RIGHT
TO SEEK JUSTICE
IN COURT.**

A small logo in the bottom right corner. It consists of the text "REAL JUSTICE IS..." in a bold, sans-serif font. To the right of the text is a small icon of the scales of justice. The logo is set against a dark rectangular background.

REAL JUSTICE IS...

I. Making Courts Off-Limits: “No Judicial Review” Clauses

Judicial review is a vital part of America’s system of constitutional democracy. The term “judicial review” refers to the power of the courts to review both acts of Congress and executive branch agencies’ actions or inactions.

Currently, many federal agency actions are subject to judicial review, meaning that individuals harmed by such actions can test the agency’s conduct in court against the requirements of applicable law.¹ Similarly, many federal and state laws provide members of the public an avenue to challenge corporate wrongdoing in court.

Judicial review allows people to go to court to uphold a wide array of rights. It allows the public to hold the government accountable for abuse of power or failing to create or enforce rules that put laws into effect.

A blunt instrument for lawmakers to deny access to justice is by simply adopting legislation that includes phrasing that denies “judicial review.” This language is sometimes embedded in broader bills that first give additional powers to federal agencies, industries, or Congress itself, then shields those actors from the courts’ oversight by prohibiting judicial review.

For examples of recent efforts to eliminate judicial review, visit www.accesstojusticereport.org.



II. Stripping Americans of Their Individual Right to Sue (Forcing Arbitration and Restricting Class Actions)

Corporate interests use other maneuvers in addition to “no judicial review” provisions to shield themselves from legal accountability. For example, they seek to insert forced arbitration provisions into consumer service and employment contracts, and seek changes to federal and state law to limit people’s ability to join together to confront broad-reaching corporate abuses.

Forced into Arbitration

The New York Times reported in 2015 that “it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration.”² Forced arbitration provisions require consumers, in order to receive goods or services, to agree that any later-arising dispute will be resolved before a private arbitrator and not in the courts. These provisions, which use fine-print “take-it-or-leave it” agreements to rig the system, have become ubiquitous in such varied settings as agreements governing bank accounts, student loans, cell phone plans, employment, and even nursing home admissions.

In addition to blocking people from resolving disputes through the court system, arbitration proceedings themselves tend to be secretive, are often biased toward corporations, and fail to provide procedural safeguards or a right to appeal (even if arbitrators ignore the facts or law). When forced arbitration clauses are combined with class action bans, neither judges nor arbitrators can assess or remedy the full scope of wrongdoing that affects multiple victims.³

Forced arbitration stacks the deck against consumers. For example, in September 2017, Equifax announced a data breach that compromised the personal data of more than 140 million people that had occurred months earlier.⁴ The company came under further fire for directing customers to a site to sign up for a free year of credit monitoring – signing up also required consumers to waive any right to sue Equifax for the breach, requiring mandatory arbitration instead.⁵ Facing public pressure, Equifax later rescinded the clause.⁶

Restricting Class Action Lawsuits

Class action lawsuits enable individuals to band together to seek redress for unlawful conduct. Class actions are powerful tools for combating corporate and government wrongdoing, empowering people to fight against discrimination, environmental contamination in their neighborhoods, the sale of defective products, and many other types of injustice.

Some of America’s most well-known court cases were class action lawsuits. *Brown v. Board of Education*, which invalidated the disgraceful and discriminatory policy of “separate but equal” in public education and began the long process of dismantling segregation in schools, was a class action. In the class action lawsuit *Anderson et al. v. Pacific Gas & Electric Company*, depicted in the 2000 movie *Erin Brockovich*, the citizens of Hinkley, California banded together to sue Pacific Gas & Electric for contaminating the town’s groundwater with cancer-causing chemicals.⁷ And in the late 1990s, thousands of people took the American Home Products Corporation to court in a series of class action lawsuits, associated with the marketing of the dangerous weight loss drug “fen-phen.”⁸

For examples of recent efforts to strip individual rights to sue, visit www.accesstojusticereport.org.



III. Making It Too Risky and Too Expensive to Sue

Where individuals have a legal right to bring a case in court, they also need the courts to be accessible on a practical level. The more expensive it is to go to court, the less accessible the courts become in reality.

Congress has recognized the importance of addressing the legal and financial hurdles individuals face in bringing public interest litigation, especially when attempting to hold the federal government and wealthy corporations accountable to the law. To facilitate this kind of citizen policing of government and industry, many statutes allow what are called “citizen suits.” These provisions empower members of the public to bring legal action against the government or private entities (like corporations) that break certain federal rules (like the Clean Air Act or Clean Water Act). While the default rule in the United States is that each party to litigation bears its own costs, many of these statutory provisions, including a statute called the Equal Access to Justice Act (EAJA), give judges the discretion to award reasonable attorneys’ fees to citizens who successfully prove a violation of federal law.⁹

According to a 2013 report by the nonpartisan Environmental Law Institute, these “fee-shifting” provisions have three general purposes. “First, they enable citizens to hire lawyers in order to vindicate certain rights, often rights that have been expressly granted by the legislative branch. Second, they give the government, and specifically executive agencies, a financial incentive to obey the law. Third, these provisions help ensure that parties whose rights have been violated are made whole through the court system.¹⁰ Moreover, if recovery of attorneys’ fees were not available, wealthy corporations and the government would have an incentive to drive litigation costs up to frighten prospective litigants or to bankrupt claimants with otherwise valid grievances.

Both Congress and the Trump Administration have sought to pick Americans’ pockets with provisions that would make recovering fees harder, or would even force people seeking to protect their rights to pay the legal fees for big corporations and government agencies. Each of these provisions was designed to prevent the public from using the courts to protect their rights.

For recent examples of attempts to make it too risky to sue, visit www.accesstojusticereport.org.



IV. Limiting Judicial Discretion

Members of Congress have proposed a host of bills to interfere with judges' exercise of discretion and the standards of judicial review. These bills aim to force judges to issue mandatory sanctions for cases deemed frivolous, impose caps on otherwise discretionary awards of monetary damages, and restrict the use of preliminary and nationwide injunctions.

Forcing Judges to Issue Sanctions

In 1983, responding to a misperception of pervasive and unjustified litigation, judicial rulemakers made a change to a federal procedural rule requiring judges to sanction and fine attorneys who were found to have brought so-called frivolous lawsuits.¹¹ Prior to this change to Rule 11 of the Federal Rules of Civil Procedure – the rules that govern operation of the federal courts – judges had discretion whether to impose sanctions. The policy continued for a decade before being discarded and discredited for failing to deter frivolous lawsuits,¹² increasing litigation costs,¹³ and chilling civil rights cases, which can sometimes rely on untested legal arguments.¹⁴ Today, judges can again use their discretion to sanction attorneys who file unwarranted cases, and lawsuits that lack merit “are often abandoned soon after discovery,” as noted by Nora Freeman Engstrom, a professor at Stanford Law School and an expert in tort law and ethics.¹⁵ Legislation proposed in the last several Congresses would go even further than the 1983 rule, making monetary sanctions mandatory.

Limiting Meaningful Remedies

Judges and juries are generally authorized to fully compensate a plaintiff for harm caused by a defendant's negligence. Economic damages are intended to cover quantifiable losses such as out-of-pocket expenditures and lost earnings. Non-economic damages cover pain and suffering, which affect quality of life.¹⁶ For example, in a case in which a medical error causes paralysis, non-economic damages could be awarded to compensate the plaintiff whose life and basic daily activities such as walking, driving, and caring for children have been drastically impaired, with profound emotional and psychological impacts that go far beyond the cost of medical bills.

Congress is considering bills that would, among other things, restrict the use of preliminary injunctions and also place caps on non-economic damages in cases of medical malpractice.

For examples of recent efforts to limit judicial discretion, visit www.accesstojusticereport.org.





I CAN'T BREATHE

BLACK LIVES MATTER
EVERYDAY

V. Blocking Timely and Meaningful Case Settlements

When a federal agency misses a statutory deadline or fails to take action required by law (such as, adopting safety standards for food or pollution control requirements for power plants), the agency can be held accountable in court, and the judge can order the agency to act. Often in such cases, the parties, overseen by a federal judge, will negotiate a deadline for the agency to take the overdue action. From the public's perspective, the sooner a new deadline can be set, the sooner the benefits of the underlying statute can be achieved.

Similarly, when an agency enforces the law – by, for example, bringing an action against a company that has violated pollution standards – the agency often settles the case. In such settlements, agencies like the Environmental Protection Agency (EPA) have often encouraged violators to direct some kinds of payments or other benefits to communities or businesses that were injured as a result of the company's unlawful conduct, but that are not directly involved in the litigation – so-called “third parties.”

Members of Congress and the Trump Administration have sought to limit agencies' ability to enter into settlements, and agencies' discretion to direct certain benefits from enforcement of corporate wrongdoing to affected communities or others who are not parties to the lawsuit. These efforts will undermine the public value of the courts and erode the power of the judiciary to effectively and equitably deliver justice.

For recent examples of attempts to block timely and meaningful case settlements, visit: www.accesstojusticereport.org.



Conclusion

With support from wealthy corporations and other special interests, Congress and the Trump Administration are trying to hinder people's access to the courts, ultimately preventing the vindication of their rights and pursuit of real justice.

If people can no longer effectively hold the government and powerful interests accountable, the federal laws that protect our civil and human rights, ensure public health and safety, safeguard workers and consumers, and protect the environment, are diminished to the detriment of all.

So, what can we do to stop it? It will take a broad partnership to defend the right of people in this country to go to court. We need a united front of organizations and individuals, standing together in opposition to this assault on a vital pillar of our democracy. This fight is not a partisan one. Rolling back access to justice runs counter to the fundamental principles upon which this nation was founded, and distances us from the American ideal of a self-governed people guided by the rule of law rather than by the desires of the powerful few.

Individuals should contact their elected officials in Congress and share this report about the threats to real justice. The ability to safeguard our civil rights and liberties, and to defend consumer, health, safety, environmental protections and more, depends on it.

For more information on this campaign and how to get involved and take action, visit www.accesstojusticereport.org.




NOTES

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