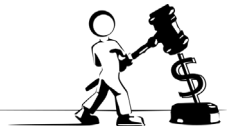
Free Law Project



FIX THE COURT

November 11, 2020

Chairman Jerry Nadler
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Jim Jordan
House Judiciary Committee
2142 Rayburn House Office Building
Washington, D.C. 20515

Chairman Hank Johnson
Subcommittee on Courts, IP and the Internet
2138 Rayburn House Office Building
Washington, D.C. 20515

Congressman Doug Collins
1504 Longworth House Office Building
Washington, D.C. 20515

Re: Director Duff's opposition to the Open Courts Act

Dear Chairman Nadler, Ranking Member Jordan, Chairman Johnson, Congressman Collins:

Thank you again for introducing H.R. 8235, the Open Courts Act (OCA), a critical, well-considered measure to consolidate and modernize the judiciary's case management and electronic case files system (CM/ECF) and end the pay-for-access arrangement that exists nowhere else in the federal government.

It was with great disappointment, though, that we read the Sept. 23 letter sent to you by Administrative Office of the U.S. Courts Director James Duff regarding the OCA. We are confident, though, that it will not deter you in your efforts to make federal court records free and fully accessible to the American people.

The number of unsubstantiated claims made in the letter are numerous, and here we aim to set the record straight.

To start, the indictment of Lexis, Westlaw and other legal data aggregators that begins Director Duff's letter was especially peculiar to us. The OCA will not, as Duff presaged, "provid[e a] windfall" to these companies; in fact, it's just as likely that competitors, no

longer burdened by unjust document retrieval fees, will upset their monopolies. The OCA will thus foster healthy competition and advance American ingenuity.

Second, the letter asks you to "give further consideration to the feasibility, scope, and impact" of consolidating CM/ECF and making PACER free. As you know, that work has already been done – by you and by your staffs – over the last half decade, as the burdens created by a diffuse system comprising hundreds of different portals, a lack of integrated search and a pay-per-page fee structure have come into sharp focus. You've responded by drafting a bill that includes both a pay-for and a step-by-step strategy for moving from the current system to a more modern, more cost-effective one.

Third, there is no proof, as the letter states, that the OCA will "increas[e] the financial burden on litigants." Instead, fees will be assessed "based on the extent of the use […], the nature of the action and claim for relief, the amount of damages demanded, the estimated complexity of the type of action, and the interests of justice." This language gives the judiciary flexibility when setting filings fees – something we had assumed the U.S. Courts would appreciate that, instead, they've turned on its head. What's more, the OCA expressly prohibits the judiciary from setting fees that would impair access to the courts, which is what PACER fees do now.

Could the fee structure take a year or two to pin down? Sure. But if other government agencies, like the U.S. Patent and Trademark Office, can assess fees based on burdens to their systems, so too can the federal judiciary.

We realize the third branch values decentralization. There's no uniform policy on public access to appellate arguments, no uniform policy of judicial wellness initiatives and no uniform policy on how, where and when opinions are posted on court websites. But federal court filings, whether they be pleadings, motions or petitions, are essentially the same everywhere in the U.S. Thus the continued existence of a decentralized document filing and retrieval system is itself a major burden to the administration of justice.

Fourth, it is troublesome how the letter sells short the incredible information technology professionals that work in each U.S. district, bankruptcy and appeals courts, many of whom we've worked with in our efforts to increase access to public documents. We have no doubt these professionals possess the ingenuity to construct and work with a consolidated CM/ECF system that can yield better outcomes at a lower cost. A publicly accessible system of filing and retrieving static PDFs could be built by a creative agency

like 18F for a miniscule fraction of the annual revenue that PACER currently (and inappropriately) generates and should only cost a few million dollars to run annually.

Fifth, and maybe most importantly, using security and privacy risks as a bludgeon to try to beat the OCA into oblivion should not discourage your efforts. Director Duff seeks to paint a free PACER system as a privacy disaster, but we have far greater concerns about the current system's security health. We believe the new system, as described in the OCA, would be more secure, not less.

The way PACER works now, there is a veneer of privacy; it seems intuitive to those supporting the status quo that the current pricing structure creates a bulwark against too much private information becoming public. In practice, the opposite is true. Because of the fee structure, litigants today often *presume* that filings are private only to find out later that information therein is being disseminated by data vendors and is available on the Internet. After the OCA passes, PACER will be public by default, and those making electronic filings will be more vigilant in following the established redaction and sealing rules – rules established long ago to carefully balance the digital availability of court filings against the public's constitutional and common law right of access.

It's important to remember there are two sides to this coin. Yes, there are those who deserve privacy in their court filings – asylum seekers and victims of domestic abuse come to mind – and existing rules protect the interests of these parties. But on the other side of the coin, these same people, and the public generally, have a compelling interest in learning about court cases involving those close to them or those who may become close to them. Greater data availability will help Americans discover more about the people they let into their lives, identifying problems before they occur. Once again, this will be a net positive result.

Further, if the judiciary wants, for a time, to continue to require users to register to access PACER, but reduce the price from $0.10 per page to $0.00 per page during this transitional phase, that would not be the worst outcome.

Though it is true that the judiciary is subject to malware and ransomware attacks, as any government agency is in the digital age is, that is not a convincing enough reason to end attempts at democratizing its content. After all, courts receive millions of dollars each year to prevent and respond to such attacks, and the OCA becoming law will not alter that appropriation.

Sixth, we agree with the U.S. Courts that CM/ECF and PACER are somewhat better and more user-friendly now than they were when we first started using the system a decade and a half ago. That does not mean they have reached a point where they're beyond the need for fixing – to the contrary. Periodic, surface improvements demonstrate that the judiciary knows the system is not up to par. Another decade-plus of cosmetic fixes isn't going to cut it. Fees greater than $0.00 are still too high, and flawed user experiences across a scattered, unnecessarily complicated interface cry out for improvement.

The OCA is that improvement. It is well-researched. It is comprehensive. It is paid for. And it should advance during the lame-duck session.

Finally, we know you have thick skin, so we are confident you were not offended by the letter's false assertion that you were less than honest during the Sept. 15 hearing that included the OCA's markup. This type of attack on your character is so off base as to not warrant a response. We hope the AO has since apologized for this misguided assertion.

Thank you again for your work on the OCA and your commitment to making our federal courts more open and accessible.

Sincerely,

Michael Lissner
Executive Director
Free Law Project

Gabe Roth
Executive Director
Fix the Court