

Talking Points on the Open Courts Act of 2020 (H.R. 8235)

- Thank you for your interest and support of the federal judiciary. I am bringing to your attention our concerns that the [House/Senate] may give floor consideration to H.R. 8235, the Open Courts Act (“OCA”) during the lame duck session. **The Judiciary adamantly opposes this bill.**
- This bill would force the Judiciary to create a completely unnecessary new electronic filing and public access document system, **estimated to cost at least \$2 billion.**
- To pay for it, litigants in civil and bankruptcy cases will have to pay **double, triple, or even more** in additional fees -- just to file their cases in court.
- These new costs would break the financial backs of many litigants, **essentially closing the courthouse doors and denying them access to justice.**
- **Congress should not take up the OCA. The bill is not ready to go to the floor.** It creates more problems than it solves.
- Please **reach out to your party’s leader** and ask them to not allow this bill to come to the floor.

The OCA subsidizes large data users and for-profit endeavors at the expense of litigants, severely limiting access to justice.

- As you know, courts maintain records of papers and briefs submitted in all cases filed in our Federal courts (generally filed on-line.) Those documents are housed in our case management system. The public can access those documents through an online system called PACER.
- **As directed by Congress, PACER is funded entirely through user fees.** However, because of **fee waivers and exemptions** authorized by the Judicial Conference, **most PACER users pay nothing** to access court records. In fact, 75% of users pay no fees.
- **The bulk of PACER fees are paid by for-profit users that access high volumes of court records.** These include large banks, data-intensive corporations, and well-funded research institutions. The OCA’s proponents don’t want those users to pay, giving them a free ride for their commercial and for-profit endeavors while forcing litigants to subsidize their business.
- **The OCA would increase the financial burden on litigants, in order for observers to receive free access to court records.** Instead of appropriating public funds for this purpose, the OCA just shifts the costs to litigants by increasing filing fees.

The OCA would require the Judiciary to create a massive new consolidated case management system from scratch, with dubious benefit.

- **Developing a brand-new court records system does not address nor benefit the public's access to court records.** The bill requires an immense, unnecessary systems overhaul that is extremely expensive and will **disrupt court operations**.
- The expense to implement the new system could well reach into the **billions of dollars**, based on comparable systems in the federal government and the states.
- As a result, to cover these increased costs, we currently estimate that **fees** for appellate case docketing, district civil filings, and bankruptcy case filings, **might need to double or triple**, a possible additional increase of **over \$500 per filing**. In addition, a new fee for bankruptcy proof of claims likely will be required.
- For many individuals and small businesses, a fee of nearly \$1000 to file a civil or bankruptcy case would be an **outright barrier**, forcing those with federal claims to forgo their day in federal court.

How this affects my court [*Adapt to your district as appropriate*].

- The increased filing fees, to fund the mandated development of a new case management system, would make it cost-prohibitive for many individuals and small businesses to file cases in federal court, effectively limiting their access to justice.
- Having to use other Judiciary appropriations to pay for costs associated with the case management system and PACER would mean moving funds from other areas, such as salaries, that could result in layoffs of court staff.
- The OCA would require my court to inefficiently and imprecisely analyze filings to impose these fees, adding additional burdens to an already strained work force and docket.
- The creation of a new case management system, as mandated in the bill, could result in lapses in the case access and filing systems, effectively shutting down all electronic access to the court for periods of time.

Secondary Talking Points:

Requiring filing fees to be set based on how complicated and burdensome a case may be, imposes an unworkable mandate susceptible of manipulation.

The OCA requires the court to increase filing fees based upon the burden that each case places on the court. It is impossible for a court to estimate, in advance, how much burden a particular case or type of case will impose. And attempting to do so can only inject unfairness into the system. This proposed fee structure would be administratively unworkable, highly speculative, and difficult to implement.

- A sliding-scale filing fee like this could incentivize plaintiffs to avoid higher fees by mischaracterizing the nature and complexity of the lawsuits.
- It would make it more difficult for courts to manage our dockets because we would be less able to predict the size, nature, or potential complexity of a case at the time it is filed.

IF ASKED: But aren't some state courts able to provide access to court records at no cost? I remember the sponsors of the bill saying that Georgia provides free electronic access to their courts' records.

Answer: In fact, while Georgia state courts provide some information for free, such as case information and docket sheets, the system charges \$0.50 per page to access their documents, plus minimum charge amounts and credit card fees. That's 5 times what the Judiciary charges to access federal court records.

Some state courts merely provide case information, such as docket sheets, without charge, but impose fees for accessing other documents. The Federal Judiciary's electronic public access to court records has long been the most comprehensive system.

Moving forward

- The Judiciary shares Congress's commitment to openness and accessibility to the courts and ensuring that the work of the courts is as transparent as possible.
- The Judiciary is committed to creating a better PACER user-experience, but we don't think it's appropriate to do so on the backs of litigants.
- The Judicial Conference does not oppose taxpayer funding of PACER through additional appropriations (but not at the expense of other Judiciary operations).
- The Judiciary is willing to work collaboratively with anyone in the Congress to improve our systems for filing, storing and make available to the public all relevant court records, but the Open Courts Act is not the way to accomplish those goals.