Rebuttal to the Administrative Office's "Review" of the Open Courts Act

January 18, 2022

On Jan. 13, the Administrative Office of the U.S. Courts posted a "review" of the Open Courts Act (S. 2614 / H.R. 5844). This legislation would modernize the federal judiciary's records system to provide free public access to court orders, opinions and filings by the parties, finally fixing the antiquated CM/ECF and PACER systems that are poorly designed, badly administered and overcharge the public for access. In an effort to slow down the bill's advancement, the AO's review contains numerous errors and misstatements concerning the legislation, which the following fact sheet corrects.

The key takeaways:

- The Open Courts Act would fully pay for the costs of modernization via specific usage fees. These fees for federal agencies and "power users" would not burden ordinary citizens, whether they be curious to learn about certain cases or seeking more information about their own case or related cases.
- There is no need to raise filing fees for litigants.
- The legislation's cybersecurity requirements are appropriate, timely and well-designed.
- The federal courts already have the responsibility for addressing redaction and sealing rules and that need not be addressed further in this legislation.
- Congress has made clear it prioritizes free, public access to court records, a goal that should be accomplished within a reasonable timeframe. By its actions, the AO has demonstrated opposition to this, even as it provides lip service to the contrary. Objections raised by the AO should be viewed through the lens of its historical obstruction and inaction.

Authorization of appropriations

The AO says: "We appreciate that the Senate Judiciary Committee amended [the OCA] to add an additional potential funding source via authorized appropriations, […but s]ubjecting the costs of developing, implementing, and maintaining the case management and public access functions to the appropriations process will significantly burden the Judiciary's overall appropriation request" (p. 1, ll. 13ff; p. 3, ll. 10ff).

The truth is: Lawmakers believe the structure they've created in the OCA to modernize CM/ECF and PACER would pay for itself, via usage fees from federal agencies, fees from high-volume users in the short term and, if needed, marginal fee increases for filings by corporate litigants in complex litigation. It's well-documented that, to put it charitably, the AO's math regarding OCA's costs is quite different.

In any event, the AO for years opposed making PACER free, but as the OCA has begun to advance through Congress over the last year-plus, it's changed its strategy and started to lobby for authorizing language. This strategy seemed to pay off, as **the version of the OCA advancing in the Senate does just that**. (Sec. 7: "There are authorized to be appropriated such sums as may be necessary to carry out […] this Act." It's likely the House will adopt this language.) Regrettably in its "review," instead of showing appreciation for this change, the AO grumbles that appropriations is not a "sufficient source of funding" (p. 2, l. 11), **once again moving the goalposts at the 11th hour**.

Recall that estimates of how much the new system would cost, according to former government technologists and IT experts, are "in the $10–$20 million range over 36 months to build and then $3–$5 million annually to continue to develop and maintain." The Congressional Budget Office puts it at even less: taking the revenue from agencies, high-volume users and filing fees into account, the OCA would cost taxpayers a mere $9 million over 10 years. (The AO has put it at $2 billion, which is not a serious figure.) Instead of grumbling, the AO should be working with appropriators in Congress on what a "sufficient" amount of funding might be.

Filing fees

The AO says: "The Judiciary would likely need to charge federal litigants significant additional filing fees to continue developing, rapidly delivering, sustaining, operating, maintaining, and providing 'free' public access to the new system" (p. 1, ll. 18ff).

The truth is: There's very likely no need to raise filing fees at all should the OCA be enacted. Just because the AO currently rakes in $140 million annually from PACER does not mean it costs anywhere near that to run. What's more, the OCA puts the judiciary in charge of any potential filing fee increases, within certain parameters (e.g., the increases are to be based on the complexity of litigation and one's ability to pay). **If filing fees rise, it'd be because the judiciary ignored its own advice and set higher fees.**

The AO says: Certain litigants, seeking to avoid certain filing fees, will "not be[]forthright about the true nature and complexity of their lawsuits at the outset of the case" (p. 1, ll. 38ff).

The truth is: This is quite the cynical take. As the judiciary knows, there are sanctions that can be levied for lying to the courts, so this should not be seen as a real concern.

The AO says: A smart way to increase the amount of money available for records modernization would be via "a change to the post-collection allocation of [some portion of c]ivil and bankruptcy filing fees" (p. 3, ll. 17ff).

The truth is: This is either robbing Peter to pay Paul, since filing fees that are paid into the Treasury are already earmarked for other non-OCA uses, or it's an idea that was worth consideration three years ago when lawmakers seeking to make PACER free moved from the conceptual Electronic Court Records Reform Act to the exactingly specific Open Courts Act — i.e., not at this juncture. What's more, the AO backs up its suggestion of post-collection reallocation with no data or further explanation as to how it would work in practice.

Will PACER ever be free?

The AO says: "The Judicial Conference has not opposed – in the abstract – to offering PACER services without charge even to high-volume users" (p. 4, ll. 17ff).

The truth is: This line harkens back to how "free" was put in quotes earlier in the document (p. 1, l. 20). "In the abstract" is not good enough. The whole point of a "free PACER" bill is to make PACER free for all users in perpetuity. **Lawmakers in both parties and advocates will not budge from this**.

The AO says: Lawmakers should add back the "budget 'safety valve'" that was in H.R. 8235, the version of the OCA that passed the House in Dec. 2020 (p. 4, l. 23).

The truth is: *The judiciary opposed that bill!* If it was so keen on ensuring this "valve" — which is really kill switch that would allow the AO director to delay the implementation of the CM/ECF and PACER modernization *ad infinitum* without cause, see Sec. 6(b)(2)(B)(iii) — it should have supported the bicameral passage of H.R. 8235. Alas, it is too late for that.

Software and cybersecurity development

The AO says: It "would prefer to pursue the iterative and agile development process as 18F recommends and that Congress provide reasonable time to transition to a new solution to minimize the risk of adversely impacting day-to-day court operations" (p. 5, ll. 3ff).

The truth is: This sounds sensible, but the operative wording here is "reasonable time." In lobbying against the OCA late last year, the **AO proposed a nine-year timeline to modernize CM/ECF and make PACER free to users**. That is far too much time than it should take to complete these projects. Without Congress including a modest two- to three-year timeline in the OCA, the AO would be delaying this project into the 2030s and beyond.

The AO says: The inclusion of language in the OCA that requires "coordination" with GSA at multiple stages of the development process "must not be interpreted to mean that GSA must approve the Judiciary's actions" (p. 5, ll. 9ff).

The truth is: "Coordination," by any definition, is not "control, access, and approval authority," like the AO implies it is. This argument is a red herring.

The AO says: It's concerned about the OCA obligating the judiciary to "comply in detail with all Executive Branch requirements" regarding cybersecurity reviews (p. 5, ll. 17ff).

The truth is: This is also a red herring. The cybersecurity language in the OCA simply asks the judiciary to complete a comprehensive review "with the relevant cybersecurity standards that would apply if the system would be operated by an agency in the executive branch." That is very different from the second branch reviewing a third branch policy, as the AO's review implies.

The AO says: "We believe we can accomplish the spirit of the legislation by making credible risk-based decisions informed by annual security assessments of a modernized case management and public access system, consistent with relevant cybersecurity standards that are practiced by Executive Branch agencies" (p. 5, ll. 27ff).

The truth is: This, like the appropriations discussion above, is another galaxy-brain take. The AO specifically asked the Senate Judiciary Committee last month for cybersecurity language to be included in the OCA, and the Committee obliged. **Yet somehow that language, four weeks later, isn't good enough?** Of course the AO can't "mak[e] credible risk-based decisions informed by annual security assessments" itself. The current security of CM/ECF and PACER is not up to par, and the judiciary needs external help in improving it, which is what the OCA does.

A fair point

The AO says: The language of the OCA should be amended to clarify that the "federal courts" for which the bill is operative do not include the Supreme Court and the Article I courts that don't use CM/ECF and PACER (p. 5, l. 37).

The truth is: This is not a meritless point. Though it should be fairly obvious from the text of the OCA what "federal courts" entail, there's nothing inherently wrong about making a small edit to the bill to drive this home. Other proposed changes of definitions (e.g., "public federal court case documents," p. 6, l. 13) are clunky and unnecessary.

Ensuring private information stays private

The AO says: The OCA "might be interpreted to require the new case record-keeping system to include and make available to the public certain records that would in fact be inappropriate to so release, such as case records under seal or records that are not normally included in the docket…" (p. 5, l. 40 – p. 6, l. 1).

The truth is: The OCA does not change the current redaction and sealing rules for federal court filings, nor does it permit the inclusion of confidential internal deliberations among judges or planning materials in online dockets.

What's more, the judiciary already has a way to ensure that electronic access to court records doesn't "make available to the public certain records that would in fact be inappropriate," via the E-Government Act of 2002. That law states (p. 16), "The Supreme Court shall prescribe rules […] to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically." It's unknown at this time the extent to which these rules, which are supposed to be updated biennially, are operative and are followed. But rules preventing exactly what the AO fears are already extant.