



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

January 11, 2022

Honorable Henry C. “Hank” Johnson, Jr.
Chair
Subcommittee on Courts, Intellectual
Property, and the Internet
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Johnson:

I am writing on behalf of the Judicial Conference of the United States (“Conference”) to reiterate concerns regarding H.R. 5844, the Open Courts Act of 2021 (“OCA”) so that we can renew an earnest inter-branch dialogue before Congress acts further on the legislation.

I reaffirm the federal Judiciary’s commitment to modernize our Case Management and Electronic Case Files (CM/ECF) system and to improve Public Access to Court Electronic Records (PACER). The Judiciary is already on a path to modernize its electronic records system, which will benefit not just the courts, but also litigants and the public who seek to access court records via PACER, the public access portal to CM/ECF. We believe the current framework of funding PACER and CM/ECF – originally mandated by Congress – using fees collected from PACER users has proven effective. We remain concerned that the proposed legislation may unduly constrain the effort we have underway.

We acknowledge Congress’s interests in the public impact of CM/ECF and PACER and that it may feel compelled to enact legislation. However, this legislation relates predominately to a matter of judicial branch operations, and we would appreciate Congressional deference to our operational needs. If legislation is to be considered, we renew our request for meaningful two-way dialogue with the House Judiciary Committee to address substantial revisions to the bill before the Committee acts on the proposed legislation. While the Judicial Conference has serious concerns with the bill as introduced, we believe there are modifications to the bill that could be identified through dialogue that could mitigate those concerns and better achieve the proponents’ goals.

The OCA would require dramatic changes to the backbone system upon which the federal courts depend for mission critical day-to-day operations. H.R. 5844, as introduced, would not only put at serious risk litigants' access to justice, but also potentially disrupt the funding needed for modernizing, operating, and maintaining the very systems the bill seeks to improve. The judicial branch, the litigants desiring to have their cases heard in the federal courts, and the public seeking access to court case records, will bear the consequences if the legislation proves operationally or budgetarily infeasible. Therefore, we urge you to not take further action on the bill until we can work together on an equitable and viable alternative.

Near the close of the 116th Congress, the federal Judiciary raised concerns regarding H.R. 8235, the Open Courts Act of 2020, noting the bill (1) posed dangers to litigants' access to justice because of increased filing fees; (2) constrained the Judiciary's funding which could jeopardize not only our electronic records systems, but other Judiciary programs as well; and (3) raised critical implementation concerns. We were grateful that discussions resulted in substantial changes to the bill before the House passed it and appreciated Leader Hoyer's statement that the House remained open to further improving the bill.

As the new Director of the Administrative Office of the United States Courts ("AO"), I was encouraged by your response to the commitment that I made in our phone calls, and letters throughout last year, to a modernized case management system and improved public access to court electronic records. My letter of April 26, 2021 (attached), emphasized the following:

- My decision that the AO must take a "fresh look" at CM/ECF and PACER, bearing in mind Congress' expressed interests and concerns, as well as the essential needs of the Judiciary.
- Our partnership with 18F, a technology consultancy within the General Services Administration, to evaluate the state of CM/ECF and to provide recommendations and a roadmap to replace the current system.
- The need for more discussions with the Committee regarding the challenging funding concerns we continued to have with the OCA of 2020 (H.R. 8235).

We made public each of the reports developed through the AO's engagement with 18F. We initiated several bipartisan briefings with the Committee, jointly with 18F, to ensure the Committee is well informed regarding what we have learned and our evolving thinking on the path forward for the modernization of CM/ECF. Significantly, these

discussions have underscored our commitment to the “iterative, agile” approach to modernization that 18F has recommended.

As indicated in our communications to you throughout 2021, the Judiciary is already on a path to an iterative and comprehensive modernization of both CM/ECF and PACER. We are prepared to undertake this modernization using existing funding mechanisms, on a sustainable schedule, to ensure the modernized system is secure and effective.

Despite the actions we have taken during 2021 to be more open, transparent, and flexible regarding the modernization of CM/ECF and PACER, I am troubled that our efforts have not resulted in productive discussions regarding potential legislation. On November 3, 2021, H.R. 5844 was reintroduced in the same form that had been approved by the Committee over a year ago, and without any public acknowledgement or support of the important modifications that had been made to the bill through inter-branch negotiations prior to House passage of the OCA (H.R. 8235) in December 2020. Nor does the current bill take in to account the progress we have made together with 18F as demonstrated in the briefings we provided. I remain concerned that the Committee may once again mark up the OCA with no hearing and no changes to its problematic provisions. I hope this will not be the case and again request a two-way dialogue to discuss changes to the OCA developed through mutual understanding.

We agree that the system for electronic court case records – essential to modern court operations and public access to records – must be promptly modernized. We agree that the portal for public access to electronic court case records should also be modernized. The remaining policy differences between the Judiciary and Congress, so far as we can discern them, may seem narrow but are critically important:

- The Judiciary is opposed to increasing filing fees to subsidize CM/ECF and PACER because of the negative effects they would have on litigants’ access to justice. The Committee has not ruled out filing fee increases.
- The Committee may be seeking complete elimination of PACER fees, even for institutions (both for-profit and non-profit) whose high-volume use of PACER is principally to serve their business model. While we do not see a public benefit in doing so (except, perhaps, in re-assessing the dividing line between an “ordinary” and “high volume” users), we are not opposed to PACER fee elimination *in principle*, so long as the alternative funding for PACER and CM/ECF is fair to litigants, effective, reliable, and administratively workable.

- The Committee may believe that annual appropriations will be available to allow the Judiciary to plan and undertake modernization of CM/ECF and PACER if the intended funding streams prove unviable. The experiences of many other agencies with annual appropriations for such projects leads us to lack such confidence.
- The Committee may be seeking a short, fixed timetable for modernization. After extensive consultations with 18F, and as reflected in the reports we have shared publicly, we believe the timetable currently proposed in the OCA is not feasible with existing or proposed resources.
- We believe day-to-day control over the construction, operation, and maintenance of the Judiciary's core case management system is integral to our independence as a branch. The Committee may be seeking to mandate participation in these activities by executive branch agencies.

The attached review by the AO of H.R. 5844 and S. 2614, as amended discusses these concerns in detail. We hope that our analysis will be useful to the Committee and will provide a constructive foundation for renewed dialogue on the legislation. We are seeking more than one-way conversations, with little mutual discussion and no alternative proposals to address the problems we identified. Without feedback from the Committee beyond bill text (or requests for "redlines" without such a foundation to build from), we are hampered in our effort to work with Congress to identify consensus solutions. I very much look forward to continued discussions.

If I may be of assistance to you in this or any other matter, please do not hesitate to contact me directly or reach out to our staff at the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,



Roslynn R. Maukopf
Secretary

Enclosures

cc: Honorable Jerrold Nadler
Honorable Jim Jordan
Honorable Darrell Issa