



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

December 2, 2019

Honorable Nita Lowey
Chairwoman
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Honorable Mike Quigley
Chairman
Subcommittee on Financial Services
and General Government
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Honorable Kay Granger
Ranking Member
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Honorable Tom Graves
Ranking Member
Subcommittee on Financial Services
and General Government
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Dear Chairwoman Lowey, Chairman Quigley, and Representatives Granger and Graves:

I write as Secretary of the Judicial Conference of the United States to express our opposition to H.R. 1164 and S. 2064, the "Electronic Court Records Reform Act of 2019," (ECRRA). After studying the bills, the Judicial Conference opposes H.R. 1164 and S. 2064 for the reasons discussed below. Judicial Conference opposition to this legislation has also been communicated to the House and Senate Judiciary Committees.

The Judicial Conference Opposes ECRRA Legislation

The Judicial Conference opposes ECRRA (H.R. 1164 and S. 2064) and any other similar legislation that would eliminate the Judiciary's statutory authorization to charge user fees for access to the Public Access to Court Electronic Records (PACER) service without providing a workable alternative funding mechanism to finance the programs funded by current PACER fees and for any related new requirements in the legislation. To do otherwise would impose a crippling unfunded mandate on the Judiciary of approximately \$165 million.

Further, the Judicial Conference opposes legislation, including provisions in the Senate ECRRA bill (S. 2064), that would authorize the Judiciary to increase filing fees to compensate for the elimination of PACER user fees, or require the Judiciary to structure such filing fees

commensurate with the burden imposed on the court by the party (with a lesser fee charged to individual filers).

I assure you that the Federal 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. And, while H.R. 1164 and S. 2064 have the ostensible purpose of seeking to make the Judiciary's PACER service "free to the public," the proposed legislation could impose substantial new costs on taxpayers or litigants and establish technical requirements that are unlikely to be achievable.

User-Based PACER Fees Have Worked Well

In 1991, Congress authorized the Judicial Conference to prescribe reasonable fees for access to court electronic records. The small percentage of PACER users that pay any fee are charged commensurate with the amount of data they access via PACER from the Judiciary's case management and electronic case files (CM/ECF) database. This user-based funding arrangement has worked well and has provided an unprecedented level of access to the federal courts, while providing a source of revenue to allow the Judiciary to maintain PACER, as well as to develop and introduce new technologies to expand public access. There are approximately 2.9 million registered PACER users and in FY 2018 alone, PACER processed more than 507 million requests for case information.

Most users already have free access to PACER through fee waivers and exemptions. The Judicial Conference has authorized exemptions for many classes of users, including indigents, bankruptcy case trustees, pro bono attorneys, and Section 501(c)(3) not-for-profit organizations. In addition, the Judicial Conference recently approved an increase to the quarterly waiver from \$15.00 to \$30.00, effective January 1, 2020, which will result in no fees being charged to approximately 77 percent of active users. Of the remaining users who do incur fees, most are "power users," generally large commercial entities, many of whom recoup their PACER costs by repackaging and selling PACER information for a profit. Their utilization of PACER far exceeds that of the typical user. *Approximately 87 percent of total PACER revenue comes from less than 3 percent of the active accounts.*

The Judiciary's FY 2020 interim financial plan includes approximately \$165 million in projected Electronic Public Access (EPA) requirements. PACER revenue is used to pay for a variety of expenses related to maintaining electronic public access, including the PACER service, the PACER Service Center, and the development, operations, and maintenance of the Judiciary's CM/ECF system. We recognize that some have questioned whether PACER fees should be spent on certain programs to enhance electronic public access to court information. While these matters are still in litigation¹, it is not disputed that the vast majority of PACER

¹ In *National Veterans Legal Services Program et al., v. U.S.*, the U.S. District Court for the District of Columbia upheld the Judiciary's use of PACER revenue to pay for the vast majority of expenditures in the Judiciary's Electronic Public Access program but ruled that web-based juror services, crime victims notification, and some courtroom technology activities are impermissible expenditures. Although the Judiciary has appealed the District Court's ruling, as an interim measure the three programs are being funded with appropriated funds pending the outcome of the appeal in the Federal Circuit.

revenues are spent exclusively on PACER and CM/ECF expenses, and any serious disruption to PACER funding will affect those critical systems the most.

Eliminating all PACER fees without providing a workable alternative funding mechanism would leave the Judiciary no way to pay for these critical, ongoing activities. As a result, either public access programs would have to be scaled back due to insufficient resources, or the Judiciary would have to absorb the costs of its EPA program within the remainder of its budget, which would come largely at the expense of Judiciary staff, including court employees and probation and pretrial services officers.

S. 2064's Proposed Changes to the PACER Fee Structure Would Be Unfair to Litigants

S. 2064, which authorizes the Judiciary to impose higher filing fees to cover the cost of maintaining the PACER service, raises additional concerns. The Judicial Conference has long held the position that filing fees should not be increased to generate revenue for Judiciary operations. Funding PACER through filing fee increases would drastically shift the cost burden to litigants, who may not be proportionate users of PACER or may not even use PACER at all, many of whom may already struggle with court costs.

The increase in filing fees that would be necessary to cover the cost of maintaining PACER would be substantial. A preliminary cost estimate shows that filing fees would have to be increased by approximately \$750 per case to produce revenue equal to the Judiciary's average annual collections under the current fee structure. This would be a dramatic increase for litigants. It could mean that the current district court civil filing fee of \$350 would increase to \$1,100. Filing fees in reorganization bankruptcy cases (i.e., cases filed under Chapter 11, which are already over \$1,000), could increase to nearly \$2,000. The Judicial Conference opposes this approach because such an added financial burden could deter litigants from pursuing their claims in federal court.

Further, it is unclear whether the filing fee scheme proposed in S. 2064 is intended to *replace* the statutory filing fees set by Congress and miscellaneous fees set by the Judicial Conference, or is intended to *authorize new or increased fees* that will be used for PACER. This distinction has significant implications for the Judiciary. If *all* filing fee revenue – statutory and miscellaneous – is now directed to be deposited into the Judiciary Information Technology Fund to maintain PACER, it would divert millions of dollars in annual filing fee revenue the Judiciary currently uses to support court operations generally, and necessitate the Judiciary to seek additional appropriations.

Structured Filing Fees Would Be Problematic

The Judicial Conference also opposes provisions in S. 2064 requiring the Judiciary to structure filing fees commensurate with the burden imposed on the court by the party (with a lesser fee charged to individual filers) as such a variable fee structure would be administratively unworkable. Filing fees are paid at the outset of litigation, at which point it is unclear how much of a burden will be imposed on the court by a party. Irrespective of the cause of action, some cases are relatively straightforward or may be quickly resolved by the parties, requiring minimal

filings and court involvement, while other seemingly simple cases turn out to be complicated and time-consuming to resolve. Trying to determine the burden on the court by the type of case filed, or some other standardized method, would be speculative, burdensome to court staff, and would likely prove to be inaccurate.

Policy and Technological Concerns

The Judicial Conference has serious reservations regarding proposed requirements in H.R. 1164 and S. 2064 for a new consolidated case management system and other technical specifications. Both bills would require the Judiciary to consolidate its CM/ECF system from the current decentralized system where appellate, district, and bankruptcy courts receive and maintain case filings on individual databases, to a national system that receives/maintains all files centrally. Both bills would also require all documents made available to the public to be text-searchable and machine-readable, which could prove infeasible because of the wide variety of document types litigants, particularly pro se litigants, may file in cases. Provisions in the bills would also give state courts the option to participate in the Federal Judiciary's newly designed CM/ECF system, raising additional concerns about how such a consolidated system could accommodate potentially differing technical requirements from at least 50 other entities.

Resource Concerns

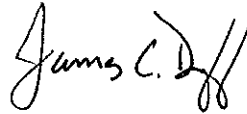
Overhauling CM/ECF would likely take an enormous amount of time and money. It is very difficult to project how much it would cost to replace the Judiciary's current system as directed by the bill, but one thing is certain: doing so within two years is not possible. Examples from the Federal Bureau of Investigation and the State of California to overhaul case management systems are indicative of years of effort and hundreds of millions of dollars spent.

Notably, neither bill provides a funding mechanism for most of the technical changes and upgrades discussed above. The filing fee structure established in S. 2064 makes those fees available only for the maintenance of the PACER service, to the exclusion of the development and maintenance of the new, consolidated case management system, capacity upgrades necessary for the system to withstand unlimited free use, and CM/ECF alterations to enable text searching and machine readability. As noted earlier in this letter, the absence of a dedicated funding source for these activities ensures that either the Judiciary will be unable to fund them in full or will be forced to divert necessary resources from its appropriations that were intended for the operations of the courts and probation and pretrial services offices.

Conclusion

Based on the concerns discussed above, Judicial Conference opposes the proposed legislation and urges Congress not to proceed with consideration of H.R. 1164 or S. 2064, the “Electronic Court Records Reform Act of 2019” or similar legislation.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff". The signature is written in a cursive style with a large, stylized "J" and "D".

James C. Duff
Secretary