Regardless of whether President Trump seeks to comply or avoid compliance with the records management statutes, the buck does not necessarily stop with him. A consortium of libraries and organizations—consisting of the Library of Congress, the U.S. Government Publishing Office, the Internet Archive, the California Digital Library, and libraries at the George Washington University, the University of North Texas, and Stanford University—have united to serve as another safeguard for ensuring the preservation of government records. Called the “End of Term Presidential Harvest,” the project seeks to comb through .gov websites from the Obama Administration to preserve materials and identify sites or information that are at risk for removal.

Other projects aimed specifically at preserving environmental information have also risen. The Environmental Data and Governance Initiative (EDGI), a team of academics and nonprofit organizations, is currently in the process of archiving public environmental information through online tools and collaborative research. One of EDGI’s collaborators is Data Refuge, a group of academics, artists, students, scientists, and teachers who work to protect information and develop best practices for data storage. Relatedly, a joint project of the University of Pennsylvania and the University of Toronto has also commenced in the months since the election. The Climate Mirror Project seeks to archive federal climate change data and store that content digitally at sites around the world.

These projects are just the beginning of a concerted and private effort to ensure that the government is not the sole preserver of our public records. There is an expectation—in both the minds of the American people and in the laws of our country—that government records be preserved. Information must pass from one administration to the next so that future holders of the Office of the President can build upon the work of previous occupants. Despite our desire for a smooth carryover of records, this has not always been the reality of a presidential transition. Indeed, despite legislation and public expectations, past administrations have proven that a second line of defense is necessary to conserve information in the maelstrom that is the presidential transition period.

Legislation such as the Presidential Libraries Act and the PRA have paved the way for record preservation in those uncertain periods between administrations, but many argue that even these efforts fall short. A second line of defense is still needed, and many groups have begun to rise to the challenge. A variety of institutions have established several different projects aimed at filling the gap and sharing responsibility for records maintenance. Hopefully, this work will result in fewer records lost and the opportunity to hold the government accountable for those that do. Maintaining our records through administrations is not only good practice, but also good politics.

**PACER FACES SPATE OF LITIGATION**

**CYNTHIA CONDIT**  
**DANIEL F. CRACCHIOLO LAW LIBRARY**  
**THE UNIVERSITY OF ARIZONA COLLEGE OF LAW**

Over the past two-and-a-half years, five lawsuits have been filed against the administrators of the federal court’s Public Access to Court Electronic Records System, also known as PACER. All of the lawsuits focus on the PACER fee system in some way, although other issues related to PACER are mentioned in the complaints. Two of the lawsuits have been dismissed. Two others have survived motions for dismissal, and
The CRIV Sheet / Volume 39, No. 3 / May 2017

One lawsuit has been certified as a class action. The final lawsuit, filed in November 2016, currently has a pending motion for dismissal.

The fact that the administrators of PACER are facing legal action is not, perhaps, surprising. Complaints about oversight of PACER’s management, its dated interface and search capabilities, and questions about its fee structure stretch back to the early 2000s. Yet, at the time PACER was introduced, it was viewed as a technological breakthrough, providing unprecedented public access to court documents.

PACER Beginnings

Roll back the years to the late 1980s, when paper was still king. Accessing court documents required a visit to the courthouse where court clerks located dockets that could be reviewed on-site or copied for a whopping fifty cents a page. At the same time, computer sales had started to skyrocket, the World Wide Web was in its infancy, and libraries had quickly recognized the value of an online public access catalog (OPAC) system, and were creating applications to manage and search collections. Not far behind, the Judicial Conference of the United States proposed opening a system called PACER to provide public access to federal case information. The responsibility of managing the new system fell to the Administrative Office of the U.S. Courts (AOUSC or AO).

Michael Kunz, a former clerk for the Eastern District of Pennsylvania recalls, “PACER was one of the most significant progressive steps in implementation of technologies in the courts. It brought information from the clerk’s office to desktop computers located in law offices, government agencies, business entities, and the news media. Stakeholders in the justice system overwhelmingly endorsed it as an efficient system.”

During the 1990s, the Judicial Conference also began to develop a Case Management/Electronic Case Files system (CM/ECF), which would permit electronic filing and updating of court records. The days of rushing to the courthouse before five o’clock closing time were coming to an end and a digital connection between PACER and CM/ECF was forged.

Initially, users accessed PACER using terminals with dial-in telephone modems, paying by the minute. In 1998, PACER transitioned to web-based access. To use PACER online, individuals had to register for an account and agree to pay an access fee of $7 cents per page to retrieve documents. In relatively short order, federal courts adopted online filing and by 2007, use of the CM/ECF and PACER systems was nearly universal. In 1999, there were 39,408 registered PACER users. By 2013, more than a million users were accessing the system.

A Self-Supporting System from the Beginning

When the federal judiciary was authorized to build PACER, no general revenue funds were provided for the initiative. Instead, in the Judiciary Appropriations Act of 1991, Congress mandated that the Judicial Conference set user fees to fund PACER. (See Pub. L. No. 101-515, Title IV, § 404, 28 U.S. C. § 1913 note). The fees were to be deposited into the Judiciary Automation Fund (now the Judiciary Information Technology Fund or JITF) to reimburse expenses for providing the service. (See 28 U.S.C. 621(c)(1)(A)).

Some argue that access to these judicial documents should be free. Others, including the plaintiffs in one of the currently pending lawsuits, want the fees to align with the current requirements prescribed in the E-Government Act of 2002. When Congress enacted the Act, it addressed concerns that the fees might be in excess of what it cost to run PACER by amending prior statutory language that stated the Judicial Conference “shall hereafter” prescribe reasonable fees, and replacing it with “may, only to the extent necessary” prescribe reasonable fees. (See Pub. L.107-347, Title II, § 205). Presumably then, if the cost of running PACER was less than what the fees generated, the fees would be reduced.
Fees Generated and Cost to Run PACER Diverge

Since the enactment of the E-Government Act of 2002, the AO has increased user access fees twice. In 2005, the fee increased to 88 cents per page, and in 2012, $10 cents per page. Other fees also increased, such as the maximum cap for individual searches of more than 30 pages. The AO has never explained how it arrived at these figures. A per-page fee is charged for every search, even if a search does not yield any results. Exemptions are available, although difficult to obtain, while some documents are free.

Over the years, PACER fees have generated substantial revenue—more, it appears, than what is necessary to run the PACER system. The excess funds have been used to pay for other costs of the Judiciary’s public access program. For instance, at the end of 2006, the Judicial Conference’s JITF had a surplus of almost $150 million, of which $32 million was from PACER fees. The AO stated it used the excess funds to pay for items in the judiciary’s information technology program so they would not have to obtain appropriated funds from Congress.

In their December 2012 Electronic Public Access Program Summary, the AO acknowledged PACER fees were “used to pay the entire cost of the Judiciary’s public access program, including telecommunications, replication and archiving expenses, the CM/ECF system, bankruptcy noticing, Violent Crime Control Act Victim Notification, online juror services, and courtroom technology.”

Clearly, the AO takes the view that the cost of running PACER encompasses the entirety of the judiciary’s public access program, and that it is complying with the requirements of the E-Government Act of 2002. Others, however, argue that the Act dictates that PACER user fees are meant only to fund the costs of operating PACER itself.

The Lawsuits

One of the active lawsuits addresses the differences in interpretation of whether or not PACER user fees should fund more than just the cost of operating PACER. The other two active lawsuits address specific issues related to PACER fees.

Think Computer Foundation & Think Computer Corporation (5:14-cv-02396-BLF) The first lawsuit was filed by Think Computer Foundation and Think Computer Corporation, both run and owned by Aaron Greenspan. The pro se lawsuit did not survive long. Filed on May 23, 2014, it was dismissed on December 4, 2014, hampered by Greenspan’s desire to fight a procedural issue at the same time. Greenspan’s argument that the PACER user fees collected by the AO violated the E-Government Act of 2002 never reached discussion of its merits.

Fisher I (and Fisher II) (Fisher I: 1:15-cv-01575-TCW) Bryndon Fisher filed a class action lawsuit in the Court of Federal Claims on December 28, 2015 (Fisher I), and the next day filed a similar class action (Fisher II) in the Western District of Washington. Defendants in Fisher II filed a motion to dismiss based on the “first-to-file” rule. Because the Fisher II lawsuit was similar to the Fisher I lawsuit filed in the Court of Federal Claims and easily met the three-factor test, the Court dismissed Fisher II.

Fisher I, still ongoing, alleges PACER overcharges because of a faulty pricing formula. Fisher hired expert computer consultants who, after conducting an investigation, discovered a systemic error in the system. PACER docket sheets are formatted in HTML, which requires charging by the byte, instead of by the page. Converted, a billable page is equal to 4,320 bytes. Fisher’s experts discovered that the system counts the bytes in case captions of an HTML formatted docket report five times when a case caption is more than 850 characters long. Depending on how long a case caption might be, a user could be charged for an additional page or two.

Defendant’s motion to dismiss argued that the PACER Policy and User Manual requires a person to exhaust all administrative remedies before filing a
lawsuit. Specifically, someone who believes their bill is an error must first notify PACER’s Service Center within 90 days and submit a special request form. Fisher did neither. The Court rejected the defendant’s argument stating, “it is not even clear from the language in the PACER documents that users ‘must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill … and submit a Credit Request Form.’” Further, the Court said there was neither a review process in place for any AO decisions nor anything that qualified as an administrative remedy.

In response to the defendant’s argument that Fisher’s breach of contract claim was ineffective, the Court stated that the AO is authorized by statute to administer PACER, and thus has authority to contract on behalf of the Government. As to whether Fisher could recover, the Court pointed out that courts dislike conditions unless the language leaves no room for doubt. Here, the Court stated that “there is room for plenty of doubt and the language in PACER’s documents cannot be construed as conditional.”

The Fisher I scheduling status order was due on March 10, 2017. The preliminary settlement talks appeared to be productive as the parties requested an extension to continue discussions. A final report is expected by April 21, 2017 at the latest.

**National Veterans Legal Services Program et al. (1:16-cv-00745-ESH)** Three nonprofits (National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice) filed a class action lawsuit on April 21, 2016. The lawsuit has survived a motion to dismiss and has been certified as a class action.

The plaintiffs challenge the legality of the current fees charged by PACER based on the requirements of the E-Government Act of 2002, claiming that the fee schedule is higher than necessary to cover costs of operating PACER.

Defendants filed a motion to dismiss on first-to-file grounds (citing Fisher I) and failure to state a claim because plaintiffs did not present the challenge to the PACER Service Center first. The Court dismissed the first argument stating that the Fisher I case challenges an aspect of formula that PACER uses to convert docket reports into billable pages, whereas National Veterans challenges the fee schedule itself. The Court rejected the second argument pointing out that the Fisher I court had already ruled on the PACER notification requirement and National Veterans did not have to notify or submit a request to PACER. In an aside, the Court added that this was of no concern since the plaintiffs were not arguing a billing error.

The Court also certified the lawsuit as a class action, making two modifications. It set specific dates for the six-year recovery period and it modified the class definition to exclude class counsel in the case along with federal government entities.

Of interest is the Court’s directive in the scheduling order that the parties conduct limited discovery in an effort to establish:

1. What portion of fee revenue during the class period was in excess of the amount necessary to fund PACER?
2. What portion of PACER fee revenue funded/supported EC/ECF and other administrative initiatives and programs?
3. What the average per-page PACER fee was during the class period?

**D’Apuzzo (0:16-cv-62769-RNS)**

The most recent lawsuit was filed November 22, 2016 in the Southern District of Florida. In this third class action suit, Theodore D’Apuzzo alleges that he was improperly charged for accessing judicial opinions, which have been freely available on PACER since 2005.

At the crux of this case is how a judicial opinion is defined. The E-Government Act of 2002 does not define judicial opinion. The Judicial Conference defines written opinions as “any document issued by a judge or judges of the court sitting in that capacity, that sets forth a reasoned explanation for a court’s decisions.”
However, the Judicial Conference left the responsibility for determining which documents meet this definition with the authoring judge. 

*D'Apuzzo* claims that the definition has been applied inconsistently and that court documents that satisfy the definition are not flagged as judicial opinions, resulting in a charge to the user.

Defendants filed a motion for a temporary stay of discovery on March 13, 2017, with the plaintiff filling a response in opposition the next day. On March 17, the Court granted the defendant’s motion for an extension of time to file a response to the plaintiff’s response to the defendant’s motion to dismiss. Interestingly, the defendant’s utilized the same arguments in their motion to dismiss in *D’Apuzzo* that have been rejected in *Fisher I* and *National Veterans*. We may see fresh arguments in their upcoming response, due March 24, 2017. Also on March 17, the plaintiff submitted a joint proposed scheduling order stating that the parties do not anticipate settlement at this time, as well as the plaintiff’s intent to seek class certification.

**Final Thoughts**

PACER faced complaints for years, but no one filed a lawsuit until recently. Why? According to Deepak Gupta, a member of the team of lawyers for *National Veterans*, it was difficult “to identify a legal pathway to take the issue to court.” To get around the judiciary’s exemption from the Administrative Procedure Act, plaintiffs have turned to the *Little Tucker Act*, which “provides jurisdiction to recover an illegal exaction by governmental officials when the exaction is based on an asserted statutory power.” So far, under this direction, the lawsuits appear to be moving forward positively for the plaintiff’s. Greater openness, transparency, and accountability about PACER could be around the corner—you might just see a notice to join a class action in your email come late spring.

*Editor’s Note: This article was finalized in mid-March. The current active cases are moving along pretty quickly and each docket is updated often, so it is likely that some of the information included has changed. Check the dockets for additional information on the current status of each case.*