DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS FOR 2002

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

SUBCOMMITTEE ON THE DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES

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HAROLD ROGERS, Kentucky
JIM KOLBE, Arizona
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PATRICK J. KENNEDY, Rhode Island

NOTE: Under Committee Rules, Mr. Young, as Chairman of the Full Committee, and Mr. Obey, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

GAIL DEL BALZO, MIKE RINGLER, CHRISTINE RYAN, and LESLIE ALBRIGHT
Subcommittee Staff

PART 8

THE JUDICIARY

RELATED AGENCIES

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DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS FOR 2002

THURSDAY, MARCH 29, 2001.

SUPREME COURT OF THE UNITED STATES

WITNESSES

JUSTICE ANTHONY M. KENNEDY, SUPREME COURT OF THE UNITED STATES
JUSTICE CLARENCE THOMAS, SUPREME COURT OF THE UNITED STATES
SALLY RIDER, ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE
DALE E. BOSLEY, MARSHAL
BILL SUTER, CLERK
ALAN M. HANTMAN, ARCHITECT OF THE CAPITOL
TONY DONNELLY, DIRECTOR OF BUDGET AND PERSONNEL

OPENING STATEMENT

Mr. WOLF. Justice Kennedy and Justice Thomas, we welcome you to the hearing today. Before I begin, I would like to welcome Chairman Rogers, who was chairman of this subcommittee for 6 years. We have actually switched. I was on Transportation, now I am here and he is on Transportation. So if you need a road or mass transit, a subway, he is the one to talk to.

We are honored that you are here. I had an opportunity to go over on Monday and look at the Court and was reminded, seeing the statue and all the information you have on Chief Justice Marshall, my congressional district is the district that Chief Justice Marshall was from. Actually in reading the biography it said, I think, in 1799 President Adams actually offered him the associate justice spot, and he turned it down and he ran for the House and he was elected to the House. Then he went on, of course, to become the Chief Justice.

Justice KENNEDY. He was always a man of good judgment, Mr. Chairman.

Mr. WOLF. The book also said that if George Washington founded the country, he sort of defined the country. It is interesting to note that. With that, I would just welcome you and recognize Mr. Serrano for an opening statement and we will go to your statements. Mr. Serrano?

Mr. SERRANO. I just welcome the justices, and once again thank you, Mr. Chairman, for your courtesies. I do have a sort of an opening statement which leads to a question, so perhaps I will do that when the period for questions comes around.

Mr. WOLF. Mr. Justice, you may begin.

Justice KENNEDY. Mr. Chairman and members of the committee, thank you very much for the gracious welcome you have given to me and to Justice Thomas. We bring to the committee greetings from the Chief Justice and from all of our splendid colleagues.This is a collegial, friendly Court, probably the most collegial, friendly Court in the history of the institution, and we bring you greetings from them.

We have with us today, in the event we need technical assistance, most of the principal officers of the court: the Administrative Assistant to the Chief Justice, Sally Rider; on her left, the Marshal of the Court, Dale Bosley; on her right, William Suter, the Clerk of the Court. Tony Donnelly, our budget and personnel officer, is known to your staff, and we very much appreciate the good communication that our staff has with yours, Mr. Chairman. It has been an immense help. We also have our Reporter of Decisions, Frank Wagner, with us, who has done a magnificent job of closing the gap between the time that decisions are issued and U.S. Reports are published. He has really done remarkable work in that respect.

When we have visitors from the judiciaries of foreign countries here or when we visit foreign countries, they are fascinated by this process that we are undergoing this morning. In countries which are struggling for the rule of law, I make the point to their legislators and to their judges that law is a capital resource. A functioning legal system is as important to a dynamic society as roads and bridges and schools. In those countries where they have tremendous needs and demands for the basic necessities of life—food and shelter and medical care, and roads and bridges—resources are scarce; and so this is a hard sell to make, because if you ask for judicial resources, it just does not sound very exciting.

But this Committee and this Congress as an institution, I think, has been very responsible and cognizant of their constitutional obligations to the Court over the years in appropriating the resources we need. There are a few areas of disagreement among us about resources, but so far as our supporting resources—courthouses and staffs and equipment—the Federal judiciary is the best supplied in the world. When foreign visitors come, again we show them the Federal Judicial Center right by Union Station. They are in awe of this as a teaching tool. Courts are essentially teaching tools. Even State judges from State courts in our own country are impressed by what they see at the FJC.

We appreciate the concern and the responsibility that the Congress has shown over the years in supporting the courts.

SUPREME COURT BUDGET

The budget that we have today is, as is customary, in two parts: the first part is for salaries and expenses; and the other for buildings and grounds. What is not quite customary is that Justice Thomas and I propose to discuss in more detail than usual the buildings and grounds portion as well, at the request of the committee, because of the unusual and extraordinary appropriation that we are asking. I know that Alan Hantman, the Architect of the Capitol, is here. He has become our very good friend, and we admire his professionalism and his help in this project. So there

are two parts of the budget: salaries and expenses and buildings and grounds.

SUPREME COURT, SALARIES AND EXPENSES

Let me talk about salaries and expenses first. The appropriation request is for $42 million. I will use round numbers. It is $42,114,000. This is an increase of 12 percent. The increase is $4,500,000. Slightly over half of that increase is for adjustments to base, and those are the kind of things this committee is quite familiar with: inflationary costs, increases in benefits, et cetera. Our inflationary costs sometimes puzzle me. Law books for some reason always go up at much greater than the rate of general inflation, and I have asked people why that is. I just do not know the answer. But you will see it as part of the adjustments to base.

Then there is the sum of just over $2 million for program increases and personnel increases. These are really in three different categories. The first is for our library system, some $250,000 we are requesting for that. We have what is called the Virginia Tech Library Catalog and Indexing System. It is very good except it is on disk, DOS operated. We have to transfer it to the Windows-type format. That is the reason for that appropriation request.

Then we have requests for five new positions for an offsite location. Because of the modernization project that I will discuss in a few minutes, we have the need to expand our offsite space. This will be for warehousing, storage, swing space, and a mail facility. We have no secure mail opening facility. Any business must open its mail and distribute it on an accurate time-sensitive basis just for the ordinary payment of bills. It is especially important to us because of filing dates. And so we are requesting five positions for warehousemen and mail clerks to operate that facility, and we think it is going to improve the security and the efficiency of the Court. We are also moving to that place some semihazardous or hazardous enterprises that now take place in our shop, like woodstaining which has paints and such materials we do not think should be in the Court. Those will be at the new facility.

COURT AUTOMATION

The most significant of the program increases is for automation. Our Court is now automation-dependent, as is the rest of the government and society, and we have done a good job in the sense of making each of our departments aware that they are automation-dependent. But we are not up to date. Justice Thomas is the chairman of our automation committee, and we rely on him to keep the Court current and up to date. I am talking about his technical expertise, not his jurisprudence. We have gone over this with some care because it is a significant item.

Just to give you an example, I have found in preparing for these hearings that our own personnel office must communicate with the Treasury Department only on e-mail. The Treasury Department won't give you certain things in hard copy. You have to have that on e-mail.

I wondered why we needed quite so much equipment and it breaks down into, again, five positions for one hardware specialist; for two software specialists; for a security and internal communica-

tions specialist so that our systems can talk to each other; and for a clerical position to coordinate those four. All of our current technical personnel are absorbed just in maintaining the equipment we have. They can't design new programs, they can't integrate in new equipment. They just don't have the time. We are asking for that capacity and for that authorization.

It is not just a matter of extrapolating. I did some work. I thought, well, we have some 250 computer terminals and I suppose I could go to some computer store and buy these things. But it is not that. We are an automation-dependent institution which wants to teach the public about our function. We have a Website that began in April of last year. Just since then, we have had 11 million hits on that. It is a marvelous tool to explain to the public our history and our traditions, the biographies of the justices, as well as materials needed for attorneys, docketing information, calendar information, and obviously the written dispositions that the Court issues. So automation is for us now a very important priority.

This budget request and this attempt of ours to bring the Court up to date in its technology is with the encouragement of this committee in past hearings. I remember when Chairman Rogers was with this committee, and as chairman he encouraged us and supported us very much in bringing the Court's automated electronic data capacities up to date.

Just before ending my comments on this first part of the budget for salaries and expenses, we do acknowledge with much appreciation the fact that in this year's budget for the current fiscal year, because of the action of this committee and of the Congress, our police force has been given benefits—pension benefits—that bring them into line with the Capitol Police and the Uniformed Secret Service. This has already made a tremendous and marked increase in the morale of our people and will help us retain dedicated and skilled law enforcement officers.

That is the close of act one.

SUPREME COURT BUILDING AND GROUNDS

Part two is the buildings and grounds request. I think, Chairman Rogers, that it was in 1997 or 1998 when we first gave the committee warning about this, and we said, well, now this may cost as much as 7, maybe up to $20 million. The Architect of the Capitol then retained outside consultants to come in and look at the building. I remember the day that Justice Souter, and Justice O'Connor and I—who are on our building modernization committee—sat down and heard the figures, and we heard that it was going to be well over $100 million, perhaps as high as $170. I conferred with Justice Souter. The first thing I did was to call then-Chairman Rogers. I reached you in the District, I think, Mr. Chairman. I told your secretary, get him no matter where he is. I told the Chairman the number, and I remember the silence on the other end of the line. But we conferred with you and your staff, and what we did was to proceed on three fronts.

The first thing we did was made it very clear to the Architect that it has been the tradition of this Court, and I think of the judiciary generally, to be very cautious and very prudent and very modest in its expenditures. We wanted the estimating process and

the work that was to be done to reflect that philosophy and that tradition. And the architects were very good about that.

Second, with the approval of the Congress, we retained our own outside architects, the dean of the architecture school at the University of Virginia, Karen Van Lengen, and an associate of hers, to make sure that we were asking the right questions so that we could present to you an informed assessment of our request.

And, third, at the suggestion of the Architect of the Capitol, there was a peer review committee which happens in projects like this. They met for 3 days. There were experts from all over the country, and a lot of the things they talked about were how to estimate these costs. Building restoration in many instances is more than original construction. We have a monumental building, a historic structure, and so you have to fish the wires through the wall. You can't tear down the wall. You have to take out the air-conditioning ducts. We find, almost to our dismay, that perhaps our past economies have not served us well because the building is in bad shape. All the basic systems have to be taken out and not only replaced but redesigned. The existing air-conditioning system is for a single core structure. That is inadequate for life safety standards and for health standards.

BUILDING MODERNIZATION

I have become an expert on air-conditioning. Air-conditioning should be vertical for maximum efficiency. And that is also required for our building because of the historic problem; you can't run new ducts through the wall. This means that new vertical air-conditioning systems have to be installed in what is now our basement area that we use for our police vehicles and for our own vehicles and for facilities and mail. So all that will have to go out and we have to expand that underground portion.

The same thing with the electrical systems. We just added more and more functions. The building was originally designed for 160 people. We now have 400. All of them, of course, need the services of the building, plus electricity. We are very concerned about an electric failure and our architects tell us the only way to do it is to change the panel completely.

So this is the scope of the project that the Court thinks should proceed. The architects, the experts, tell us that it is not optional, that it is mandatory if we are going to stay in the building, and we think we should stay in the building.

I can assure you that the committee, despite our lack of technical expertise, is very much interested in active supervision of the project. The Architect of the Capitol has been very good about that. If the project goes forward as we request that it should, we want to have the Supreme Court as a building which the American people still admire and which symbolizes the continuity and the stability and the beauty of the law. That concludes my statement. I am sure Justice Thomas would like the opportunity to fill in anything that I have missed.

[The information follows:]

Justice Anthony M. Kennedy
Supreme Court of the United States

March 29, 2001

To the House Appropriations Subcommittee:

Mr. Chairman and Members of the Committee, Justice Thomas and I appreciate this opportunity to appear before your Committee to address the budget requirements and requests of the Supreme Court for the fiscal year 2002.

We have with us today Sally Rider, Administrative Assistant to the Chief Justice; Dale Bosley, Marshal of the Court; William Suter, Clerk of the Court; and Tony Donnelly, Director of Budget and Personnel.

A fair and just legal order is essential to the capital infrastructure of a free society. A fair and just legal order presumes, of course, the existence of a functioning judicial system, a judicial system which is neutral and effective. The courts cannot serve this purpose without adequate resources. It is your privilege and responsibility to provide those resources,

and we are here today to assist you as best we can in your inquiries and deliberations. As we discuss funding and resource levels here today, you are entitled, of course, to ensure that those resources are being used in an efficient, economical way, consistent with achieving our great purposes.

Justice Thomas and I bring you greetings from the Chief Justice and from all of our valued colleagues.

As is customary, the Supreme Court's budget request is in two parts. The first is for Salaries and Expenses of the Court. The second is for Care of the Buildings and Grounds. To address what we understand to be the concerns of the Committee, and to allow full consideration of the major funding request for modernization of our building, we will be pleased to talk about Buildings and Grounds in much more detail than usual.

I.

Let me turn first to Salaries and Expenses. With regard to this portion of the Court's budget, our total fiscal year 2002 budget estimate is $42,114,000. This is an increase of $4,556,000, or 12 percent, over the budget authority for the

current fiscal year, 2001.

Most of the fiscal year 2002 increase represents base adjustments -- that is, required increases in salary and benefit costs and inflationary increases in fixed costs. Specifically, $2,171,000 of the adjustment represents required increases in salary and benefit costs. Also, the sum of $307,000 is requested for inflationary increases in fixed costs, allowing us to keep up with rising costs in all of our necessary operations. This results in a $2,478,000 increase to the budget base.

In addition, we request $2,078,000 over base adjustments this year to fund eleven positions and three program increases. The majority of the cost of the increases, $1,821,000, is related to technological improvements in automation and security. Our Court now uses information technology for all of its basic systems. Like so many other parts of government and society, we are automation dependent. We are not, though, up to date. Following the suggestions of this Committee in previous hearings, we think it is important to take the next step and to ensure that our staff and our technology are modern. Our situation at present is that our technical staff must spend its time simply maintaining

existing, inadequate equipment, leaving insufficient time and expenditures for necessary improvements.

We request four technical positions in the Court's Data Systems office: a PC/Network Specialist to test and deploy new equipment and technology, two Programmer/Analysts to develop new software applications, and a Local Area Network/PC Security Specialist to develop and support Intranet/Internet applications and insure the security of the Court's sensitive data. The total cost of these four positions is $216,000.

We also request $250,000 for a consulting service contract to change the Court's integrated library system that was installed in 1987 from an outdated DOS based application to a Windows platform. We are requesting an increase of $1,300,000 to the data systems area of the Court's budget to fund new software and hardware technologies, to provide training, and to enhance computer security. The Court will take necessary steps to ensure that we are cost-effective in selecting our data systems, and we will try to achieve savings wherever possible. With this authorization we intend to fund such activities as: upgrading equipment for the Justices and the Court's technology lab, engaging consultants to

evaluate security measures and increase automation skill levels of Court staff, and introducing specialized technology for security.

The remaining $257,000 we are requesting as an increase to the Salaries and Expenses account is to add seven positions: a telephone operator to perform telephone console operations duties, an administrative assistant to provide budget, procurement and other administrative support for the Data Systems Office, and five positions to provide logistical support for off-site warehouse space that will be expanded pursuant to the Court's renovation project.

In concluding my comments on this part of our budget, it is important to acknowledge that the Committee and the Congress have included in this year's appropriation bill provisions to bring the Supreme Court Police into line with retirement provisions for similar police departments. This decision has resulted in an immediate, marked increase in the morale of our dedicated people; and it will help us retain the much needed protection of a qualified and stable police force. The Court most appreciates the Committee's determination to take this action.

II.

The 2002 budget request for Care of the Building and Grounds is $117,742,000. This amount includes an increase of $110,000,000 to modernize our 1935 building by upgrading the Court's life safety, security and utility systems.

When it first became apparent to us that modernization was needed, we advised the committees of Congress that the cost would be somewhere between $7 and $20 million. Then the Architect of the Capitol and his team took a careful look at our building. They found that its most basic systems, now more than 60 years old, must be replaced. What had happened is this: To avoid patchwork changes, the Court had deferred installations and improvements of vital safety systems. From one standpoint, I suppose, this effected certain economies. The downside is that, although the building has not yet had a major failure, we are now at serious risk. We were advised by the architects and the engineers that they must not only replace but also redesign basic building systems, including electricity, air flow, air quality, and life and safety systems.

As mentioned, we had not known of these matters when we first confronted the necessity for modernization. When we received the present cost estimates, which at first were well in excess even of the $110 million now proposed, we were shocked. Justice Souter and I, who were then serving as the Court's representatives to this Committee, at once informed then-Chairman Rogers of our concerns. As a result of these and further conversations with the committees of the Congress and their staff, we followed a three point program.

First, we advised the Architect and his team that we wanted the quiet and careful nature of our work and our institution to be reflected throughout the planning and implementation of the project, requiring caution in any expenditure of funds.

Second, with the encouragement of the Committee and indeed of the Architect of the Capitol, the Court retained its own architectural consultants to help ensure that we were asking the right questions and fulfilling our role in the planning process in the right way.

Third, the Architect of the Capitol convened a peer review

committee of outside consultants, including a noted architect, a cost estimator, and engineers specializing in structural, mechanical, electrical and fire protection systems. Our own architects – including Karen Van Lengen, the Dean of the University of Virginia School of Architecture – were also part of this group. They met in Washington over a period of three days. The conclusion of the peer review committee was that the Architect of the Capitol and his team were using sound cost methodologies and that the major work they recommended for our building was necessary.

Even as the process continues, the architects are conducting tests and experiments that will lower these costs. The modernization project is overseen by a committee composed of Justices O'Connor and Souter, and myself. We will be careful before approving the various segments of the work in their specific details.

So, for the first time since the building opened in 1935, we must undertake a major renovation of it. Like the White House and the Capitol, we like to think that the Supreme Court building occupies a special place in American life and in the

constitutional system. Unlike the White House and the Capitol, our building has not been updated since its original construction. Included in the modernization of the building's 66-year-old systems will be the installation of protective life safety systems such as fire detection and sprinklers and the ability to purge smoke from the building in the event of a fire. The mechanical, electrical and plumbing systems are so out of date that a disruptive, and possibly dangerous, system failure is more likely every year that the proposed modernization is postponed.

We consider it important that the modernization be accomplished as one project on one master timetable. There are numerous efficiencies in accomplishing the modernization as one project with one prime contractor, and we request authorization to proceed in this manner. An additional, overriding consideration for conducting it this way is so that the Court can remain in the building during construction.

We are convinced that this project is essential for the continued safe and efficient operation of the Supreme Court. We underscore both the necessity of the work and its absolute urgency. Mr. Alan M. Hantman, Architect of the Capitol, will

submit a separate statement to the Subcommittee regarding this portion of the total budget.

This concludes a brief summary of our request. We will be pleased to respond to any questions that the Members of the Committee may have.

Mr. WOLF. Justice Thomas?

COURT AUTOMATION

Justice THOMAS. Good morning, Mr. Chairman. Thank you. Members of the committee, thank you for having us again. I have very little to add to Justice Kennedy's statement. I think he was thorough and precise in his rendition of the budget request this year.

I would add one small point or emphasize one small point with respect to the automation. In our work, the computer has replaced law books and has become the central part of our research. Also, it has replaced the traditional legal pad. Our work is done at the computer. One of the things that I noticed when I came into this committee room are the screens you have on your computers which not only save your eyesight but make your work more comfortable in its execution. Those are the kinds of things we have to revisit, because we spend all of our time before these screens, as well as our law clerks. It is something that is that simple that is included in our request.

Last year, Congressman, then-Chairman Rogers asked me how we were proceeding in our automation efforts, and I indicated then that we were being rather cautious and proceeding prudently but rather conservatively. It was my estimation, as I alluded to in my testimony, that we should be more aggressive and catch up before we fall farther behind.

The effort this year, and I think it is a rather modest effort, is to catch up and to make sure that we can bring automation to the Court and make it usable, since it is central now in our work.

FIRE AND LIFE SAFETY

Mr. WOLF. Thank you. I had an opportunity and I would encourage other Members—maybe what we could ask is for an opportunity some time in the next couple of weeks for the Court to make available to all the Members and/or their staffs to see what I happened to see on Monday. I think reading about something and hearing about it is different from actually seeing it.

I personally support what you are trying to do and will do all that I can. The building is old. I might say the building is very well kept. In fact, we could learn a lesson. We might want to hire their person. Compared to the Cannon House Office Building, the Supreme Court is very well kept. But as you go behind the marble, I could see the dry wooden structure, the ducts we saw were being patched.

I did notice, there were no fire exit signs. And the wiring that we saw was very old. Are there exit signs?

Justice KENNEDY. There are some, but they are not as visible as they ought to be.

Mr. WOLF. Are there sprinklers in the building?

Justice KENNEDY. Not in the major rooms, no.

Mr. WOLF. There are not sprinklers. Are there smoke detectors throughout the building?

Justice KENNEDY. Not adequate. There is no central smoke detection system, other than human, which I will explain later.

Mr. WOLF. And I notice the overcrowding, you have forced some offices out into the hallway, that if there was a fire you would actually be blocking people from leaving the building. Is the building handicapped-accessible throughout the building?

Justice KENNEDY. No. When I first came, we had a wooden ramp for the outside that looked like the ramp on the Sacramento River boat line. It was a very ugly thing. We have now a very monumental and handsome outer ramp. And we have elevator access. But the remodeling should accommodate the handicapped to a much greater extent than it does now.

SUPREME COURT CONSTRUCTION

Mr. WOLF. The building was built in 1935?

Justice KENNEDY. The ground was cleared in 1930. Construction began in 1932. It was completed in 1935. The architect was Cass Gilbert who did the Woolworth Building and I think the New York Customs House. He was a great architect. That is why the building is in such good shape. It has great monumental spaces in it. I think the cost of that building was about $10 million. So far we have spent almost that on the design and development plans for the modernization of it.

Mr. WOLF. Has the building been renovated at all during that period of time?

Justice KENNEDY. Not for 65 years, no. All the basic systems are original and out of date.

Mr. WOLF. Is it the original air-conditioning system?

Justice KENNEDY. Yes, sir.

Mr. WOLF. Without drawing any alarm, someone made the comment that it was the same system that they had in the Bellevue-Stratford when they had Legionnaire's disease. Is it the same system?

Justice KENNEDY. It is basically the same system, and it involves the necessity for the Architect of the Capitol personnel on a daily basis to go to one of four or five receptacles, take water out of cans, scrub the cans with chemicals, put it back. They rotate this work. The architects are very concerned about this.

BUILDING LIFE SPAN

Mr. WOLF. Maybe the Architect can answer this. What is the life span of a building like that? How often should it be renovated?

Mr. HANTMAN. I would tend to think, Mr. Chairman, that we are talking about 35 to 40 years as a normally expected life span. Some of the base building systems really have a 25- to 30-year span. So we have really gone 2½ times the expected life span of the base building systems.

I think as Justice Kennedy pointed out earlier, it took quite a while for us to really point out to the justices and, Mr. Kennedy, if you ever need a job in architecture, I think explained it very well before. And I think this last year Chairman Rogers had directed us to go back to the drawing boards and double-check everything, make sure all the frills are out of this project. We have done that, as Justice Kennedy has indicated. We have gone through peer review. I think the staff that we have over at the Supreme Court has acquitted themselves admirably. The Court basically is unaware of

when a feeder burns out at night because it is replaced overnight and things are taken care of without the Court really being impacted, but we have gotten to a critical point at this point where we just can't hold it together with any more baling wire or Band-Aids, we really need a full replacement of those base building systems which have more than outlived their expected life.

[The information follows:]

STATEMENT OF ALAN M. HANTMAN, FAIA
ARCHITECT OF THE CAPITOL

Fiscal Year 2002 Appropriation Request

SUPREME COURT, CARE OF THE BUILDING AND GROUNDS

U.S. House of Representatives
Committee on Appropriations
Subcommittee on Commerce, Justice, State, The Judiciary

March 29, 2001

Mr. Chairman, I am pleased to submit a formal statement to present the budget for the Care of the Building and Grounds of the Supreme Court.

I would like to begin by describing broadly the present role of the agency. For the Legislative Branch, the Office of the Architect of the Capitol (AOC) is the agency responsible for the structural and mechanical care, maintenance, cleaning, and operation of the buildings and facilities supporting the Congress, including the Capitol Power Plant. This responsibility extends to the Botanic Garden, and the structural and mechanical care and maintenance of the Library of Congress buildings and grounds. This office also undertakes the design and construction of new facilities and alterations of existing facilities.

As you know, for the Judicial Branch, the Architect of the Capitol, by authority of the Act of May 7, 1934, is responsible for the structural and mechanical care of the United States Supreme Court Building and Grounds, and this is the reason for this statement. I am not charged with responsibility for custodial care, which is under the jurisdiction of the Marshal of the Supreme Court and is provided for in the Court's salaries and expenses

appropriation.

The budget request for the care of the building and grounds for fiscal year 2002 begins on page 1.23 of the Supreme Court justification and amounts to $117,742,000. A reduction of $400,000 to this amount will be described later in this statement. However, for purposes of clarity the following amounts in the opening paragraph are consistent with the original budget request.

The request represents an increase of $110,229,000 over the fiscal year 2001 available appropriation of $7,513,000. The amount requested of $117,742,000 is comprised of $7,033,000 to maintain current services in fiscal year 2002 and $110,709,000 for program increases.

Current Services - FY 2002

The amount to maintain current services in FY 2002 is $7,033,000, a net decrease of $480,000 from the 2001 budget of $7,513,000. The net decrease of $480,000 in base adjustments is comprised of the following: increases of $138,000 for mandated pay related costs and $225,000 for increases in costs of utilities and supplies; and decreases from the fiscal year 2001 funding level totaling $843,000 for nonrecurring items including elevator improvements and the telecommunications infrastructure project.

Program Increases

Once again the budget includes a five-year capital budget plan. A total amount of $113,834,000 is requested for three capital budget projects in fiscal year 2002, of which $3,525,000 is in the budget base. The projects include improvements for disabled accessibility ($25,000); installation of roof fall protection ($309,000); and design

completion and construction costs of the building renovation and improvements project ($113,500,000). A fourth project, improvements to the parking lot ($400,000) is respectfully withdrawn from funding consideration in FY 2002. While this project was included in the budget request for fiscal year 2002, it has since been determined that further study is required. The withdrawal of this project brings the total amount required in fiscal year 2002 to $117,342,000, of which $113,909,000 shall remain available until expended, instead of $117,742,000 as reflected in the President's Budget.

Building Renovation and Improvements

By far, the most significant item in this budget is the funding requested for the building renovation and improvements project. The Supreme Court Building, unlike other buildings on Capitol Hill, has not been upgraded since its completion in 1935. At 65 years of age, virtually all of its building systems have far exceeded any reasonable life expectancy, and they require an aggressive daily maintenance schedule to continue operating. In addition, building life safety, security, and essential building system requirements have advanced greatly since 1935. It has become critical that the Supreme Court Building be brought up to current standards, since each year that the project is postponed potential risks increase significantly to over 300 occupants and 1,000,000 visitors a year. For example, the building incorporated the latest in fire resistant technology when it was built, but modern life safety systems, consisting of fire detection, fire suppression, fire alarms, and building egress, have not been provided since the building was completed. Also, security concerns were significantly different in federal facilities in 1935 than they are today. Likewise, essential building systems, consisting of mechanical and electrical components, have not been

upgraded since 1935. Virtually all systems have become obsolete and replacement parts are not available.

The funding for the building renovation and improvements project has been requested as a lump sum in order to award a single construction contract. A single construction contract is important for several reasons: to achieve single source contractor accountability for integration of the components that comprise the life safety, security, mechanical, and electrical systems; to maximize success in the performance of the integrated components; to minimize damage to the historic building by disturbing ceilings, walls, and floors only once; and to minimize the disruption of court occupants during renovation. A single construction contract is also the most cost-effective, since every construction contract must bear an overhead cost to contract, move on and off the project site, provide tools and equipment, and disturb ceilings, floors, and walls.

With the support of this Subcommittee, much progress has been made toward refining the scope and design for the project since our preliminary presentation. The budget request for this project is now based upon completion of 75 percent of the preliminary design. I am pleased to report that the earlier order of magnitude cost estimate has been reduced from a total of $140 million to $122 million, including design and estimated renovation costs.

As you may be aware, in fiscal year 1999 Chairman Rogers encouraged us to engage in an independent peer review of the project to objectively evaluate whether the scope and cost were valid. That effort took place in conjunction with an additional set of independent reviewers brought in by the Court. The review took place and the conclusions were

threefold: that the scope was valid, that the cost was reasonable, and that the renovation was necessary and should not be delayed. We are now in a position to begin this project with the funding requested in fiscal year 2002.

I am also pleased to advise you that I have recently appointed Mr. James M. Michael as Project Manager of this very important endeavor. Mr. Michael will report directly to Assistant Architect of the Capitol, Michael Turnbull, and will guide the renovation and modernization of the historic Supreme Court Building, which dates to the 1930s. Mr. Michael comes to this office from the 15-campus University of Texas System, where he was a senior project manager for the Office of Facilities Planning and Construction.

To date, a total of $8,783,000 has been appropriated for the improvements project. In fiscal year 1998, an amount of $225,000 was appropriated on an annual basis to provide for a study on improvements and upgrades to the Supreme Court building and systems. Preliminary design of this project began in fiscal year 1999 with an amount of $1,529,000 which was maintained in the budget base in fiscal year 2000 for continued design work, as well as an amount of $2 million for window upgrades. In fiscal year 2001 an amount of $3.5 million was provided for continued design work which will be retained in the budget base for fiscal year 2002. In addition, as previously indicated, $110 million is required in fiscal year 2002 for design completion, construction documentation, a final cost estimate, and start of construction late in FY 2002.

I assure the Chairman and Members of this Subcommittee that I will work closely with you and the Subcommittee staff, as well as the Court, between now and the time the Subcommittee marks up this portion of the appropriations bill to achieve a rational and

adequate funding level to support the needs of the Court.

Mr. Chairman, that concludes my statement and I shall be pleased to respond to any questions that you and the Subcommittee may have.

RENOVATION PROJECT PHASING

Mr. WOLF. What do you do when some of the equipment goes bad? One of the staff people who was with me pointed out that the company whose label was on one of the pieces of equipment had gone out of business. What do you do when something like that takes place?

Mr. HANTMAN. We sometimes take a piece of equipment, a shaft, an element that is cracked or broken and we will take it out and have it go to a machine shop to replicate that piece because it is not cast or sold anymore. So we will actually make pieces for equipment that those sections are no longer available for.

Mr. WOLF. Okay. I will recognize Mr. Serrano. Again, if we can set up a time with the Court, maybe allow Members to come over and maybe see what everyone else has been talking about, I think it may very well be helpful. We will attempt to do what we can, particularly with regard to the danger on human life and the fire. Anyone who has remodeled a kitchen in the last 10 years can understand. My one question is, are you going to do it all at once? Will you move out of the building at all? Or will you stay in the building during the entire time?

Justice KENNEDY. I first told the Architect that I was prepared to urge my colleagues to leave the building while the work was being done if this were cost effective and if this would save us time. The Architect was very clear that this would not be a cost saving, that it would cost more and that we can live in the building during the renovation. Most of the things that we have described are things you don't see anyway. It is going to be a difficult 5 years. We will have jack-hammers plus attorneys to contend with, I suppose. I actually thought about the possibility of where we might move and what it would do to the staff. Also, we think that the continuity of the Court, the stability of the law, and the symbolism of the permanence of the Court, would be somewhat impaired. The architects assure us that it is not cost effective to move out and that the work can be done in a 5-year period.

Insofar as phasing, we urge that there be one contract. Number one, it is easier to supervise, to hold people responsible. When I did my only other courthouse project, which was the Pasadena courthouse, Mr. Ed Roybal was very instrumental in helping us do that. This was also a reconstruction, and we found it was very important to have one contractor. Incidentally, that building came in ahead of time and under budget.

Mr. WOLF. Mr. Serrano?

Mr. SERRANO. Thank you, Mr. Chairman. Let me first preface my comments by saying that I will join you and the Members of the committee in making sure that in every way possible we help the Supreme Court get the resources necessary to do the work they have to do and to operate under the conditions they have to. Let me, however, say that very rarely does a person, a Member of Congress, or a representative of the people, have an opportunity to speak to Supreme Court justices in a public forum, or a private forum for that matter.

STATEMENT TO THE JUSTICES

I just felt it necessary—that there was a statement that I had to make, but I do this with the utmost respect at the beginning and at the end of the statement, and utmost support for you. I always looked at you in a way, and still do, much different from the way I look at any other body in our government. In fact, I had decided that if I had become chairman of this subcommittee this year, I would have treated you in a different way by not having you appear before the committee and beg for more paper clips, computers, renovations and air-conditioners. My approach would have been to have your staff and our joint staffs get together and work out numbers agreeable to you.

I thought of doing that because I felt that you should be treated with the respect that the Court merits and that you should be offered the kind of affection reserved for very few, and I still feel that way.

But then this past year, you went and broke my heart by getting involved in a political decision. After all, the issue of a Presidency was not an issue of lawyers or plaintiffs or doctors and patients or the building of roads. It was an issue about electing the leader of the greatest democracy the world has ever known. But the pain that I felt from the Court is nothing compared to that which has been brought upon millions of people throughout this country, who were hoping that the Court would stay out of this political mess.

Here is the problem. I represent a district in the Bronx made up of over 95 percent minorities, mostly Puerto Ricans, other Hispanics, and African Americans. Our community gave more than 90 percent of their vote to the candidate who received the most votes across the country and still did not become President. The result has troubled them in a most dramatic way. They are angry, bitter, and disenchanted with the whole process. Some of them say this felt like what they remember about the days before the civil rights movement. Others say that it reminds them of political systems they left behind in other countries where the winner never takes office.

Add to all of this the fact that the final tallies came from a State that had close family ties to the winner, and you can see why my community is very upset.

Here is my question, and, again, I ask it with the utmost respect. At what point would the Court consider speaking to the American people, especially to minorities, and explaining to us the reasons why the Court got involved, explaining perhaps the dangers if the Court did not get involved? I believe that you could alleviate many of the fears and feelings that people have of being disenfranchised. And, most important, could the Court play a role in getting people in the legal profession to explain, especially to minorities, that the chances are that the selection, election of a President in this way may never happen again?

I don't want to beat a horse to death, but I can't tell you how difficult it has been for me all morning to decide whether to make this statement, because I take seriously the fact that you are on the Supreme Court, that you are the law of the land in the most dramatic way. But so many of you played a role in making sure

that people had the right to vote, and some of those people now feel that their rights have been totally trampled on. And so I am not saying this as a confrontational statement but rather speaking as a partner, saying, is there any way that we could join together to make sure that people don't feel left out ever again?

I thank you and I ask for your forgiveness if my statement has offended you in any way.

COURT AS AN INSTITUTION

Justice KENNEDY. Congressman, of course what you say expresses views that we knew during this case, before it was issued, many people would hold and continue to hold. You have to think about the Court as an institution. We have a language, an ethic, a discipline, a tradition, a dynamic, a grammar, a logic that is different from the political branches. It is not better, not worse. Different.

Justice Thomas and I and our colleagues will be judged not by what we say after the fact in order to embellish our opinion or detract from what some of our colleagues say. We will be judged by what we put in the appellate reports. That is the dynamic of the law. We are the only branch of the government that must give reasons for what we do. We gave those reasons. Because of time constraints, they were perhaps in somewhat more truncated form than they might otherwise have been.

I have taught constitutional law for many years now, Congressman. I have always maintained in my classroom that voting is a fundamental right. I teach fundamental rights in Europe and in the United States and make that point. That was the holding of this Court. That was the holding the Court made for the first time. Seven members of the Court thought there was a violation of the equal protection clause. We disagreed as to what the remedy ought to be. The legal profession, the legal culture, other branches of the government, society at large over the next 2 or 3 years will debate and judge and assess the merits of that opinion. I am sure there will be disagreement. We hear close questions on which there is and ought to be disagreement.

In the European Court of Justice, there are no dissents. The European justices say, how can you do this? How can you have a system where you criticize each other? Isn't this bad for the institution? We say, "No, it's good for the institution." We want to make it clear that by our dynamic and our discipline and our tradition and by our dissenting opinions and by our reasons, that the issues we decide are very difficult ones.

Ultimately, the power and the prestige and the respect of the Court depends on trust. My colleagues and I want to be the most trusted people in American life. How do you instill that trust? Over time you build up a deposit, a reservoir, a storehouse of trust. And when we make a difficult decision in many areas—and this was not the most difficult decision that the Court has made, for many of us—you draw down on that capital of trust. You must make sure you are listening to the right voice, not the wrong voice.

I have been a judge for over 25 years. I know how hard it is to search for that voice and to make sure you are doing what is neutral. Each one of my colleagues in that process distinguished him

or herself in the eyes of the others by the care and the sincerity, sometimes even the passion, that they brought to the issue.

I think, I hope, I trust, I am confident, that over the next few years as the legal community, the academic profession, the people in political life know about this decision, they will come to understand that this was in the courts. We did not bring it there. It involved a constitutional issue of the gravest importance, decided 4–3 by a State Court on a Federal issue. It was our responsibility to take the case.

Now, sometimes it is easy, so it seems, to enhance your prestige by not exercising your responsibility; but that has not been the tradition of our Court. So I think over the years—I will not discuss with you the merits of the case, and you can have a seminar about it and maybe there are some very fascinating issues there—but as I have indicated, I am confident that the people will understand the position that the Court was in, and will trust the institution for what it is.

Mr. SERRANO. Justice Kennedy, let me just say, I asked you if you could ever speak to the American people. I think you just went a long way to doing that and I certainly respect your comments.

Justice KENNEDY. Thank you.

Justice THOMAS. Just a couple of additions to Justice Kennedy's I think quite eloquent explanation. I think you are very much entitled to criticize. I think anyone is. And I think accepting that criticism comes with the turf. I think that if we are not capable of accepting that as a part of the job, then I think we are incapable of being judges on difficult issues. It is on difficult issues that the Court is required to be the Court.

The questions you asked were implicitly and sometimes explicitly asked and discussed among us. Not interests but institutions and what we were doing, the institution of the country and the Court, the Presidency, et cetera. We did not bring a lawsuit. I certainly had no interest in being involved. If I wanted to be in politics, I know where to go. I am not interested in being in politics. If there was a way, and I only speak for myself, to have avoided getting involved in that very difficult decision and simultaneously live up to my oath, I would have done it. For many of the reasons you expressed, perhaps in a different way. But I have the concerns that underlie your statement.

There was every incentive, I think, for the Court as a body to avoid that. The capital that Justice Kennedy was talking about of trust, you can retain. You can bury it. You can never use it. But I think we all individually took an oath to decide cases honestly and to make decisions honestly. And I think each member of the Court did that. They disagreed, as we often do, but I think in the end in our conversations we each lived up to our respective oaths.

With respect to conversation with the country about it, we attempted to do that. It was on a very short time frame, or in a short time frame that we had to consider that. But I can assure you that having been at the Court now for almost a decade, I have yet to hear the first political conversation, and I heard none during the consideration of that, and I knew of no member of the Court who was interested in the outcome as they were in discharging their re-

sponsibilities. I know for me, I was only interested in discharging my responsibilities as opposed to avoiding them and playing it safe.

Mr. SERRANO. Thank you.

Mr. WOLF. Thank you. We have a vote on. We are down to 2 minutes. We will recess. There are two votes, back to back. We will recess for about 10 minutes and be back.

[Recess.]

Mr. WOLF. The committee will reconvene. I recognize Chairman Rogers.

JUDICIARY APPROPRIATIONS

Mr. ROGERS. Chairman Wolf, Mr. Justices, members of the panel. It is good to see you here again. This is one of the highlights of the year for this subcommittee. Although it is frankly a minuscule part of our budget, it is a very important part of what we do, because this is one-third of the whole government. Some say the second most important. The Court from its earliest days in this building has climbed from the basement—to first the main floor of this building and then to your own building. Early on, the Court was not recognized to be a very important part of the government, frankly. When you began to declare acts of the Congress unconstitutional and to tell the President what to do, we gave you a second floor office. Eventually we even found the money to build you a separate building. So the Court has climbed in importance to its pinnacle at this time.

Still yet, this interesting arrangement that we have in our Constitution where this branch of the government funds the independent branch, the courts, is unique. It puts us on a spot of trying to be absolutely fair and equitable in treating the Court without asking anything in return. That is really tough for a Congressman to do. But I think we have treated the Court fairly over the years, as you have said, Mr. Justice Kennedy, and we will strive to continue to do that.

I was pleased in your justifications where you plan to spend $1.55 million for various technology upgrades and another $261,000 for five additional employees to command those new systems. As Mr. Justice Thomas has said, the automation age is upon all of us, and I am thrilled that it is finally reaching its pinnacle in the highest Court and that you are plugged into the latest technology that is available. It is amazing that we have come this far where that screen in front of you has replaced the quill and ink of earlier eras. So I am very pleased with the way the Court has been able to move from the legal pad to the computer age as rapidly as you have. We want to continue to help you do that. I don't think we have reached the end of the line quite yet, do you, Mr. Justice Thomas?

COMPUTER TECHNOLOGY

Justice THOMAS. I agree with you. I think that we are not close to the end of the line. My concern has been that unless we caught up now, we would be left behind because it is moving so fast, the technology is moving so fast.

When you were talking, I was thinking about my wife at home in the evenings who receives her e-mails remotely with something

about the size of a Palm Pilot, I guess they call it, a BlackBerry or something like that. I find that absolutely astounding. And I am trying to figure out how you can do that. I think that is amazing.

Mr. SERRANO. We can get you one today.

Justice THOMAS. Oh, no, thank you.

We have gotten to the Palm Pilots but not to that. The other thing is to come in here and to watch. When I was in the Senate, we listened to the proceedings, as staffers, with a squawk box that was piped into the floor proceedings. Now you have a computer screen where you can actually watch the floor and switch back to your work or minimize the TV and continue with your work or watch some other event. I think that is astounding. We are not where you are. That always concerns me. And we are not where many of the other Federal courts are, and that concerns me. We would like to be there and I think we indeed need to be there.

Mr. ROGERS. If you are not where we are, that concerns me, too.

Justice THOMAS. Well, we are obviously not.

BUILDING RENOVATION

Mr. ROGERS. I sometimes wonder where we are.

Let me switch quickly to the building because that is a huge part of your budget request, as you have said. You are asking $117,340,000 for the building renovation. That is a huge increase, of course, over last year's level of $7.51 million for the maintenance of the building, in three different categories, as I understand. For the life safety part of the repair, $20.17 million which includes sprinklers, smoke detectors, a fire alarm system, and modifications to the egress patterns to ensure employees and visitors may be safely and easily evacuated in an emergency.

A second aspect, security, is $27.86 million. This includes construction and consolidation of police facilities into a more secure location of the building, and new visitor screening processes and window enhancements.

And the third part, the largest part, $65.47 million for complete replacement of the heating, ventilation and air-conditioning systems as well as the electrical wiring and plumbing replacement.

As you have described, Mr. Justice Kennedy, when you called me that day down home in Kentucky, I was flabbergasted. There was sticker shock, so to speak. I had expected something, as you did I am sure, a good deal more modest number than the $170 million tops that was estimated at that time. We asked you to go back and scrub those numbers and the Architect and you and your staff have done just that. And I think you have done a good job with it. You have scrubbed it well. I think you have taken out the bells and whistles to a large degree, and I think you are down to a sustainable and defensible project here.

It is very expensive but we are dealing with a very old building with archaic equipment of an era which has not been touched since that time, by and large. We are also dealing with a very historic building that we want to preserve in as original a condition as we can, consistent with security and safety. So I think you have done a good job in paring down the number.

Mr. Chairman, I join you in supporting this project, now that the hard work has been done in making it clean as a whistle, I think.

There is one question I have though, and that is, this is a 5-year project. Do we need to put the full amount of the request up front? If so, why do we need to do that? Why can't we do this over a 5-year period, as we do most everything else, rather than plop down the entire cost up front? A good part of it will not be spent until 5 years from now.

Justice KENNEDY. I simply don't have the expertise or the knowledge of your budgeting process to answer that. We would rely on the committee to suggest the most appropriate way to complete the project. I would hope that whatever solution you come to, you do allow us to bid with one contractor for one project at one time. I am not sure if that condition and that request relate to your suggestion or not. I just don't know the contracting authority rules under which you operate.

Mr. ROGERS. Maybe the Architect can help us with that.

Mr. HANTMAN. Thank you, Mr. Chairman. We have a very complex project here. We are going to be working in an occupied building for a period of years and going into, on a sequential basis, each of the spaces in that building.

We have a very similar problem right now in the Capitol itself. The Chief Administrative Officer of the House as well as our office will plan to get into a single room at a single time to accomplish the telecommunications work, the detection work, the alarm work, the sprinkler work, at the same time, so that we don't inconvenience the occupants of those offices more than once.

So when we are talking here about a single point of contact being responsible for everything that happens in each segment of the building, it is critically important from our perspective, Mr. Chairman, to deal with the issue of responsibility and liability. If we are coming into a space at one time trying to get everything done at one time, we need all systems to be impacted.

Justice Kennedy and I were just talking during our little break about the fact that our mechanical systems won't need total replacement. The existing mechanical systems will have to be up and functioning while the new system is built in stages throughout the rest of the building.

Mr. ROGERS. I think what I am driving at is this is a 5-year project, is it not?

Mr. HANTMAN. Yes.

OUTLAY SCHEDULE

Mr. ROGERS. What is your payout schedule with the contractor? Can we pay you in five installments? Can we pay you in five different years for parts of the work? That is all I am getting at. I am trying to figure out how we budget for this.

Mr. HANTMAN. The concept of having a single contract and a single responsibility for the entire project, I think, is critical to the process. If we bid up to 20 percent of the work on a 1-year basis and then the same systems are dealt with by another contractor potentially through another bid situation——

Mr. ROGERS. You misunderstand. You contract with one contractor. I understand that. You don't pay him everything up front, though, do you? You don't pay him the entire cost at the beginning of the project?

Mr. HANTMAN. But we need the obligational authority to commit to the volume——

Mr. ROGERS. I understand that. But what are you going to ask of us the first year? We are only looking at one year's budget here. We want to know how much it is going to cost us just this year. Next year.

Mr. HANTMAN. We are talking about the full value of the project, Mr. Chairman, so that we cannot have an antideficiency situation and we can commit to a single contractor for the full length of the project.

Mr. ROGERS. Then we have got to talk. I will leave that to the Chairman.

Justice KENNEDY. Mr. Chairman, I have lived in blissful unawareness of appropriations and contracting methodology with the Federal Government. If the full amount can be obligated consistently with your guidelines, then how it is reflected in the budget is, it seems to me, your judgment. I should think that if you obligate the amount, as I understand your budgeting process, the public has to know that amount and the committee has to approve it. But I may be wrong and, of course, the staff can discuss this.

Mr. ROGERS. I think what will happen is that you enter the contract over a 5-year period. As far as our budgeting is concerned, I think it probably will be scored, all of it, in the first year. What we outlay is a different question. That is what I am asking for. What is the outlay for 2002?

Mr. HANTMAN. We certainly could work out numbers in terms of real dollar outlays for each of those years.

Mr. ROGERS. Fine. Because the Chairman, when he writes the budget, has to total up how much money he is actually laying out on the table.

Mr. HANTMAN. My concern was the scoring as you bring it up.

Mr. ROGERS. It will be scored, no doubt, as a total figure in 1 year. But what he has to figure out——

Mr. HANTMAN. We can get you a cash flow of how we project these dollars to be——

Mr. ROGERS. Could you get the Chairman an outlay schedule of the 5 years? How much roughly would it be the first year, guessing at it? How much is it?

Mr. HANTMAN. The first year would be the foundation work and the work on the north side, so the first year would not be as significant as the successive years, getting the work started on the Maryland Avenue side and getting systems up and running. We can certainly get you that information.

Mr. WOLF. I think what Mr. Rogers is saying, when you remodel a house, you sign a contract with a subcontractor to do the house, let's say, for $50,000. And then there is a draw-down as you go through the process. The first month maybe he wants $10,000, the next month—I think that is what Mr. Rogers is trying to do here.

Mr. HANTMAN. My only concern was again being able to commit to a contract for the total scope. We can get you that information.

[The information follows:]

12/12/00 rev ARCHITECT OF THE CAPITOL
SUPREME COURT, CARE OF THE BUILDING & GROUNDS
FY 2002 BUDGET REQUEST
OBLIGATION &OUTLAYS SCHEDULE

OBLIGATIONS

OBLIGATIONS

		Obligations		Available	Obligations	Available	Obligations	Obligations	Obligations	Obligations	Obligations	Obligations
10x0103 – No Year Funds	FY2000 end	FY 2001	FY 2001 end	FY 2002	FY 2002	FY2003	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
73 Renovation & Restoration	$3,681,056	$2,681,056	$1,000,000	$114,500,000	$105,900,000	$8,600,000	$1,850,000	$1,350,000	$1,350,000	$1,350,000	$1,350,000	$1,350,000
66 Mock up	$100,000	$100,000	$0	$0		$0						
67 Windows	$2,000,000	$800,000	$1,200,000	$1,200,000	$1,200,000	$0						
Total	$5,781,056	$3,581,056	$2,200,000	$115,700,000	$107,100,000	$8,600,000	$1,850,000	$1,350,000	$1,350,000	$1,350,000	$1,350,000	$1,350,000

OUTLAYS

OUTLAYS

		Outlays		Available	Outlays	Available	Outlays	Outlays	Outlays	Outlays	Outlays	Outlays
10x0103	FY 2000 end	FY 2001	FY 2001 end	FY 2002	FY 2002	FY2003	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
73 Renovation & Restoration	$5,228,072	$4,228,072	$1,000,000	$114,500,000	$16,200,000	$98,300,000	$16,300,000	$16,000,000	$16,000,000	$16,000,000	$16,000,000	$16,000,000
66 Mock up	$100,000	$100,000	$0	$0	$0	$0						
67 Windows	$2,000,000	$800,000	$1,200,000	$1,200,000	$1,200,000	$0						
Total	$7,328,072	$5,128,072	$2,200,000	$115,700,000	$17,400,000	$98,300,000	$16,300,000	$16,000,000	$16,000,000	$16,000,000	$16,000,000	$16,000,000

FY 2002	Oblig	Outlays
MD Ave	$13,200,000	$1,300,000
Construction	$75,600,000	$8,000,000
Windows	$10,300,000	$1,000,000
Pavilion/Screening	$1,800,000	$900,000
Addl fees	$500,000	$500,000
Admin cost	$500,000	$500,000
Contingency	$10,000,000	$10,000,000
Total	$105,900,000	$16,200,000
Available	$114,500,000	$114,500,000
Carry to 2003	$8,600,000	$98,300,000

Mr. ROGERS. Mr. Chairman, thank you very much for allowing me to ask these questions. It is good to see the justices. We wish you well, Mr. Architect. Congratulations to you on a good project here. We look forward to seeing the dust flying across the street.

Mr. HANTMAN. Thank you very much, sir.

Justice THOMAS. Thank you.

JUDICIAL SALARIES

Mr. WOLF. Mr. Obey?

Mr. OBEY. Thank you, Mr. Chairman.

Mr. Justice, I don't really intend to comment on the case that was raised by my friend, Mr. Serrano. In the 32 years I have been in this institution, I have defended vociferously the right of both the Court and the Congress under the Constitution to make wrong decisions, and we have done both fully over that period in my view.

Being from Wisconsin, I have followed the Chief Justice's record for a number of years, and remembering some of the early cases for which he was an advocate with respect to elections, I didn't think that he looked a lot like St. Paul, but perhaps he is when it comes to the question of equal protection under the law, and I welcome the conversion.

But let me get to a question that I think goes to the integrity of the institution, yours and ours. There was an effort made last year to—first of all, let me ask the question, what is the Chief Justice paid these days?

Justice KENNEDY. Oh, don't do this to me, Congressman. He receives $5,000 more than we do. About 186.

Mr. OBEY. 186. And associate justices are 181?

Justice KENNEDY. Yes, sir.

HONORARIA

Mr. OBEY. I know that last year an effort was made to loosen the limitations on outside income for members of the Court in order to allow them to accept honoraria so that they could give a speech and be paid for it. I chaired the commission in the House years ago that first limited the ability of Members of the Congress to accept honoraria and then finally abolished it.

Frankly, in the early days I accepted honoraria myself, because I don't think I was sufficiently aware of the appearance of a conflict of interest that could appear when that happened. And frankly, I also think that the attitude of the group providing the honoraria changed over time and I came to be very uneasy about the way I felt that changed. And so when Tip O'Neill asked me to write an ethics code, I asked him whether he wanted a hard one or a soft one, and he said hard. And I asked him—because we had this issue of outside income and largely the problem at that point within the House was because of the problem with lawyers, and their outside income—and I said, do you want us to just impose outside income limits on the lawyer Members of this place or do you want us to apply it to everybody? He said, everybody. Even though that meant that he himself took a significant effective pay cut.

I will tell you one story. When we imposed that limitation on outside income, one of the lawyer Members came to me and said, "Obey, you don't understand the situation. It doesn't take any of

our time away from our job. You just don't understand it. It is just that if you are a lawyer, as you rise in seniority, the lobbyists toss more business your way and you just get a piece of the action." I said, "I know. That's why we're imposing the limit." and that is why we eventually banned it, because we felt that you did have a potentially corrupting spigot in the system.

I just want to say that if the Court feels or if any individual members of the Court feel that their compensation isn't adequate, then that issue needs to be directed frontally. But I think it would be a fundamental corruption of the process if either your institution or mine were to wind up loosening the rules so that either one of us can accept outside income from other sources which might be brought into question.

I am personally amazed at a number of reporters who think nothing of giving five or six speeches a year to the same kind of interest groups and then routinely reporting their issues on the national airwaves. I think that that creates a significant appearance of bias. And I don't think, frankly, that your institution, our institution, or their institution can afford that perception.

Just in light of the Chief Justice's, as I understand, temporary support for the effort that was made in the Senate last year to lift the honoraria cap, I would hope that the Court would not support any such effort in the future, because I think it would be tremendously damaging to public trust were that to happen.

Which brings me to my real concern. I don't want to discuss any specific case with you and I certainly don't want you to comment on any case, either in the past or any that might be before you, but as a practicing politician who has been in politics since 1962, I beg the individual members of the Court to recognize the corrupting result of a series of decisions which have in essence equated money with speech under the first amendment. I respect the intellectual exercise that got the Court there. But the fact is, I met a woman last Friday who is on Medicaid. I was up in a small city in my district to open a mobile dental clinic. This woman had had a very sick husband for a number of years. She had a son who desperately needed to have the braces taken off his teeth. She called 31 dentists and couldn't get one to take the braces off the kid's teeth. So finally her husband held the kid down; rather, she held the kid down and her husband took the braces off with a pair of pliers.

We have a political system today that produces that kind of living condition for souls like that. Yet we have people coming into my office demanding that I totally remove the estate tax for people who will make 50, 60 or $70 million. I submit to you, sir, that that kind of a result would not happen if we were able to directly limit what people can spend to influence the political process and the campaigns.

The Congress is about to pass Feingold-McCain, I assume. I will vote for it. Or I will vote for the House version of it. But in the end I submit that if it passes, it will be because a hard-nosed political judgment has been made in this place, a cynical judgment, that it probably won't make that much difference and so they will let it go.

I would urge you to recognize that if you cannot—I want equal justice under the law, but I also want equal justice in the Congress

when it comes to determining economic assistance and living conditions for people. And we determine that every day. To me when the Court equates money with speech under the first amendment, it has the effect of allowing people with a lot of money to drown out the speech of average people in this country who desperately need attention but get very little of it because of the nature of our campaign system.

When Mo Udall was alive, he used to hope that if the Congress contained or put into a campaign finance bill, if we put in a congressional finding that the existing system had become so corrupting of public confidence in the system that it required limits, that the Court might change its position in Buckley v. Valeo and other related cases. I have always doubted that would be the case. I had always hoped it would be.

But I simply want to say, if there is anything I have learned in 40 years in politics, and I love this country and I respect your institution and ours, but I am mortally concerned about what big money is doing to our political system. And so long as Congress can only address it under these kinds of conditions, we can't produce anything that will be truly effective in creating equal justice under the law.

I beg the Court to recognize not just the theory but the realities of politics, because if they don't, our democracy in my view cannot survive in a way that will deliver the goods for average people who ought to be at the top of our priority list.

Thank you, Mr. Chairman.

Justice KENNEDY. Congressman, as you know this is an issue that I simply cannot comment on.

Mr. OBEY. I don't expect you to comment.

Justice KENNEDY. I feel rather uncomfortable in discussing the subject.

Mr. OBEY. I don't expect you to comment.

Justice KENNEDY. We are, as you know, writing about it in a number of cases.

Mr. OBEY. As I say, I don't expect you to. But I just think the public needs to understand if indeed, as one observer noted once, that the Court did eventually respond to public opinion, I would hope that public opinion would help all of the institutions to recognize what the practical realities are.

Mr. WOLF. Mr. Miller?

ARCHITECT PROJECT MANAGEMENT

Mr. MILLER. Getting back to the appropriations issue, the Architect of the Capitol, you are working with them. Would you comment why you are using the Architect of the Capitol because of the separations, and do we share other agencies of the government? It is not a question of capability. It is a question of separation. You all are extremely independent from Congress even though we are right across the street from each other. We are, I guess, sharing the Architect of the Capitol. Is there any other agency or such? I know you have your own security and things like that.

Justice KENNEDY. As you know, Congressman, the rest of the Federal Court system works with GSA and, by tradition, in order to respect our independence, we do not; but we need the technical

expertise of the Architect. We, of course, work with the Office of Management and Budget for the technical support, analysis, et cetera. I am not sure we share other agencies.

The physician of the Capitol. Of course, the United States Marshals are our security outside of Washington, D.C.

Mr. MILLER. It was a voluntary thing to use the Architect of the Capitol in this situation because of the expertise, knowledge of historical preservations, such as that?

Mr. HANTMAN. The act of May 7, 1934, 48 Statutes 668, specifically makes the Architect responsible for the Court building. It may well go back to the time when, as the Chairman indicated, that the Court actually occupied the same first increment of the Capitol, as did the Library of Congress, along with both houses of Congress.

SECURITY DESIGN

Justice KENNEDY. I will answer the architecture questions and Mr. Hantman can answer the legal questions.

Mr. MILLER. Let me go back to the issue of the building and such. I look forward to seeing the condition up close. You mentioned the air-conditioning, and I have one bit of trivia. The Chairman spoke about Justice Marshall being from your district. In Statuary Hall, there is a statue from the State of Florida, Dr. John Gorrie. It says underneath his name, "from the State of Florida, inventor of mechanical refrigeration and the ice machine.".

We have some historical significance. You told me about your air-conditioning equipment. In Florida, it is very critical to our growth and success.

The security issue. I know you can't talk a lot about security in a public forum, but almost 3 years ago we had the death of two police officers here and so we are going to a visitors center. I see the lines in front of your Supreme Court occasionally. Is that part of it, the security design? Is that a major component of the new design? Built back in the 1930s, security obviously was not as much of a concern as it is today.

Justice KENNEDY. That is a major concern of ours. We just can't treat our visitors very well. We have, Congressman, over a million people a year visit our building. They, of course, all have to be screened. It is now done in the vestibule just above the main stairs, which has no air-conditioning system at all. It is very unpleasant in the summer. That really is not an adequate place to do it in any event, and so a major part of our concern under the Architect's work with us has been to develop a new security screening procedure.

Basically at this point we have two options. One is to build a separate, freestanding structure. We have aesthetic and architectural concerns about this. The other is to have the entryway in what is now entry to the lower Great Hall. Both of these would probably mean that you could not enter the building up the front steps, and we are very unhappy about that. It is a symbolic and memorable experience to walk up the steps of the Supreme Court. These two options would require that the steps would be for exit only, but we think we may have to adopt this plan.

Mr. MILLER. We are going underground with our visitors center. They are not going to be using the steps. They are going to go, I assume, down an escalator.

Justice KENNEDY. We have looked at your plans. We thought about stubbing an underground entrance into our building but we simply couldn't handle your number of visitors.

TECHNOLOGY SECURITY

Mr. MILLER. How about security on the technology side? We are not allowed—we have limitations of what we can do for e-mail to our constituents. I have a BlackBerry, but there is a security concern there. I assume that is part of the whole technology area is how do you handle security and getting information; like the case they were having last year, you were having to access it.

Justice THOMAS. That is one of the reasons we were reluctant to have the universal access to the Internet at the Court, which we don't have. We have been very parsimonious in the use of the Internet at the Court. Our system that we use is our own internal server that is encrypted. A number of the things, I think $450,000 of the request is for security purposes, to hire individuals who are more familiar with security; consultants to get into biometrics, so that we don't have to go through quite as elaborate an encoding system to even get in my laptop, so if there is a power surge or something, start all over again—or if I forget my security card. One day I left for a trip and left my security card there. Well, the computer was useless to me because I couldn't get into it. We are trying to make it more user friendly but equally secure.

We also have grave concerns about allowing a system that is connected to the outside world to somehow compromise our internal security and the confidentiality of our opinion process, or to get a virus in our system which would debilitate us.

The security is a major concern of ours and it has been a major impediment to our use of an external e-mailing system. In fact, that was a consideration in not allowing our Website to be housed at the Court. It is at GPO. We simply did not want to run the risk of that system infecting our internal processes.

I might add that that system—this is unrelated to the security question—last year when we testified about this time, we told you that it was imminent, that we would have our Website up and running. In the meantime, that system has generated about 15 million hits, 6½ million during the consideration of the Bush v. Gore case. So that has worked well offsite, and we don't have the security concerns. But security is a major issue and it has been a major hurdle for us.

Mr. MILLER. Thank you, Mr. Chairman.

HOUSE REPORT DIRECTIVE

Mr. WOLF. Mr. Kennedy.

Mr. KENNEDY. Thank you, Mr. Chairman. I want to begin by welcoming the justices. It is an honor to be on this committee and to have an opportunity to sit with the Supreme Court. I want to identify myself with my colleagues, Mr. Serrano and Mr. Obey, both of whom made excellent statements that I entirely concur with and appreciate their courage in making those statements, especially

Mr. Serrano. I am a new member of the committee, and so it wouldn't likely be left to me to make something—a statement as controversial, so to speak, as that, because I wouldn't know the protocol. But judging from his district, maybe he doesn't know, because they don't know the protocol.

I want to thank him because he also honored me by saying his inspiration for making that statement was in part due to his memory of my uncle, Robert Kennedy, former late Attorney General of the United States. I think that is a great tribute to my Uncle Robert.

I want to make a couple of comments and ask for your consideration about a few items, the first of which I want to get out of the way, and that is to ask a question that one of my colleagues, Congressman Jesse Jackson, Jr., who is a member of the full committee and therefore couldn't be here on the subcommittee to ask the question, but he is following up on the pursuit of our late friend Julian Dixon, and so I feel very privileged to ask this question on behalf of Mr. Jackson and our late friend Julian Dixon.

A year ago, the NAACP documented that the Supreme Court has a long and current history of noninclusiveness to people of color and women. As of only a year ago, the NAACP documented that of the 462 clerks hired by the nine justices at the time, the NAACP reports only 1.9 percent were African American, 9 out of 462. Only 1.1 percent have been Hispanic Americans, 5 out of 462. None, zero, have been Native Americans. And you think about the disposition of Federal justice and the fact that Native American reservations come under the jurisdiction of the Federal judiciary, and you think about the implications of the Federal code on Native Americans, when they are subject to the Federal code, not the State Code. And the fact that only a quarter of the clerks were women, when over half of the current law school graduates today are women and only a quarter were clerks.

So, given these statistics last year, I would like to ask you what you have done to respond to the report language, House Report 106–680, report language said that, quote: Justices who testified at the hearing responded by stating that there is a heightened awareness about this issue. The justices have had a number of discussions with circuit court judges and law professors and intend to expand the pool of applicants from which clerks are chosen.

Given that being your or your counterpart's testimony in the previous year, I would like to ask you, what have you done to address this report language in the last year so that we can help mitigate these enormous disparities?

Justice KENNEDY. Since I became a judge in 1975, I have made it very clear to the people that help me to look for clerks throughout law schools around the United States. I take many from regional law schools as well as the major law schools such as Harvard, Chicago, Stanford, Yale and others. I have always made it a very important point to say that I search after qualified minorities and women, and have done a fair job in that regard.

The hearings last year, prompted by the late Julian Dixon's question, and I believe even the year before, did cause the Court to take a second look at this. We are renewing our effort. Law school enrollment of women, it was reported in the press last week, is now

close to or just about 50 percent or maybe even more in some law schools. Of black law students, I think 11, 12 percent. Hispanic is very low for some reason. I just don't know the reason for that.

So what we have to do is make sure that at all elements of the system—law school admissions, circuit court clerkships which are the feeders, or State supreme courts which are the feeders for our clerks (because we need clerks with 1 year of previous experience)—are sensitive to this issue. I think it having been raised in the committee has been very helpful. We have again a renewed and conscious awareness to do better.

LAW CLERKS

Justice THOMAS. I think I will reiterate what I said last year, and that is, that we recruit law clerks from a well-known pool. There is no secret to it. I happen to agree with Justice Kennedy, that I don't think that the repository of all knowledge and intellect is east of the Mississippi or in the Ivy League law schools, so I don't take as many clerks from the Ivies as perhaps some others might.

At the same time, I think that we recruit from the top of the class, and I think the question should be asked of law schools, why aren't the minorities at the top of the class? That is a well-known ticket to Federal clerkships and that is where we recruit. We don't take clerks from law school. We recruit from other Federal judges.

I think, though, that if you look at the numbers, and I assume that is part of your question, there has been a change in the make-up of the law clerks. Again, I would also say that Mr. Dixon, whom I always enjoyed discussing this with, and just a tremendous gentleman, very passionate about this and very concerned about it, but my point to him was that it would change; that some times it is difficult to wait, but that it would change, and indeed it is changing. This year, we have of the law clerks, 25 males, 10 females, 2 African Americans—Justice Breyer and Justice O'Connor have those—4 Asians and 1 Hispanic.

I think that as the awareness that this is a problem continues, as the law schools see that they are not doing a particularly good job in making these kids aware of the opportunities and in seeing to it that they are at the top of their class, that you will see even more. I do not think, as I said last year, that it is as big a problem with women as it is with minorities. And I don't think it is as big a problem with Asians as it is, say, with blacks or Hispanics. I think that we are aggregating concerns that are quite different.

I, for example, have two women law clerks. I have three coming next year out of the four law clerks. That is not because I planned it. Because they are there, they are available in the pool, it is not very difficult to hire them. But to find blacks or Hispanics is very, very difficult.

Mr. KENNEDY. I appreciate your not only admonishment to the law schools and maybe other circuit courts but also your admonition to them to encourage and work on trying to advance this cause, because it reflects poorly on all of us as a society.

ADA

I would like to ask another question that dovetails with that in some respect. I know that the Court has found that in the University of Alabama v. Garrett that the ADA Act imposed obligations that went further than the Constitution itself, and that this cannot be done because discrimination based upon disability has not been raised to the same level as the constitutional scrutiny of race, the 14th amendment.

Given all the new funds that you are requesting, what is the Supreme Court doing to conform with the ADA? Are you planning to conform with the ADA? And as the Congress is now starting to try to adhere to its own laws as well, will you do anything in that regard?

Justice KENNEDY. The Architect, without our instruction, just from his knowing the law, has told us that he will comply with the ADA in all respects. There are some monumental areas where I am not quite sure these will work, but we are satisfied that it is accessed, and disabled-friendly systems throughout all the public areas of the building and in most of the private areas.

Mr. KENNEDY. Would you see it as the Court's requirement to comply with it, or, as you said, it would be to follow the contractor's intuition that this is something they should do?

Justice KENNEDY. I am not sure it is an intuition. I would defer to the Architect, but I think he has a standard that he is going to comply with it to the extent that the building permits it.

Mr. HANTMAN. Our architect and engineering team have been directed to make sure that the building is fully accessible.

Justice THOMAS. Let me, if you may indulge me, two points. One, when I was in the Attorney General's office in Missouri, one of my best friends, and still one of my best friends, is a quadriplegic. We had to lift him into the Supreme Court. This was in the days when accessibility wasn't as big an issue. We would lift him over curbs, things like that. That had an impact on my years at EEOC. If you have ever been to EEOC's headquarters, it is 100 percent accessible.

There was some quibbling when I moved them to that building, that we could take a building where people who weren't mobility-impaired would have to come in the rear of the building. My response was, everybody comes in the rear of the building.

We are dealing here with a historic building and a building that has certain portions that can't be made accessible; for example, the curved staircase. But you are talking about, I assume, the accessibility of the public to come to see the Court and discharging its responsibilities.

Mr. KENNEDY. Absolutely.

Justice THOMAS. Justice Kennedy was instrumental in making sure that a ramp was installed consistent with the architecture of the building. So the commitment I think that you are looking for is there. If I enjoy good health during my tenure, I don't have any responsibility for that, but I do believe that the conference is very sensitive to that. The Architect has been very sensitive and, of course, we are.

Mr. KENNEDY. I agree with you. There is nothing for us to be patronizing about. There but for the grace of God go each and every one of us. The fact of the matter is that they are all American citizens. They deserve the same opportunities that every able-bodied American citizen is entitled to, and the notion they can't even get into their government buildings is a travesty.

We had to reconstruct the floor of the House of Representatives so that my colleague, Congressman Jim Langevin, could even serve in the United States Congress.

So we are in the year 2001, and I know it takes us some time to get through to things, but I appreciate your comments with regard to that and am excited to see the renovations.

MENTAL HEALTH

The final series of questions that I wanted to ask were in relation to some things that I had spoken to Justice Kennedy about prior to the hearing, and that includes the judiciary's estimated increase of mental health cases by 14.3 percent in the 2000 levels.

My question in short: It seems to be evident to me, as Justice Kennedy remarked in the reports that he had pointed out he will send to me, that our Federal judicial system is not adequately responding to mental health problems, given the fact that according to our Surgeon General's report, mental health affects roughly 20 percent of the adult population who contend with mental illness in any given year.

I would like you, for the record, if you could just talk to me about both of your own experiences in dealing with the need for mental health treatment services within not only our Federal court system but also our State court system as well. If you could comment on that, I would be very appreciative.

Justice KENNEDY. As you know, Congressman, we are essentially a reactive institution where we cannot institute policy. We do have cases come before us, more frequently now because of the Americans with Disabilities Act, involving people with mental illness. Society as a whole is way, way behind on recognizing the extent of this problem. The best ways to alleviate it are not well explored. In the penal system, there are, I think, inadequate funds in the correctional facilities to diagnose and treat these people. Years ago—you probably can't remember them—we had what they called insane asylums. People were locked up there. The invention of the tranquilizer was about as important as the invention of penicillin. It allowed these people to function, or so we thought. But the severely mentally disabled person can function all right in a normal society if he or she has the discipline to take the medicine. But they don't have the discipline to take the medicine, because they don't have a caregiver. We have addressed some of those cases in the ADA context.

Justice THOMAS. I really have nothing to add, Congressman Kennedy. I think that as the ADA cycles through our system, you see all sorts of disabilities being litigated. Of course when I was in the executive branch, we had any number, but they came in different levels. There were some in the context of education or workplace; what do you do with a kid who has been found retarded, for exam-

ple, in the educational context. You have employees, as an employer, who have difficulties that you work through, et cetera.

I think people are becoming more aware, as Justice Kennedy indicated, that these things now are not instances to ignore people but rather to treat them. As far as we are concerned, however, I just simply haven't seen that many of the mental health type cases coming to the Court. I would submit, though, under the ADA we will get a plethora of all sorts of cases, not necessarily mental health, but all sorts of disabilities.

FUNDING FOR TREATMENT SERVICES

Mr. KENNEDY. As we talked about earlier, it is clear in our society today, with 2 million plus people in the judicial system, that our country is gravely ill and—that is, we can't think of this as just a phenomenon that can be unrecognized. I know that many people in the jails are people that were formerly in those insane asylums, as you said, Justice Kennedy. For us to be treating them in a corrections atmosphere to me seems like cruel and unusual punishment for people who don't know the difference between reality and unreality in many of these cases.

I appreciate, Justice Kennedy, your remarks regarding the need for additional funding for these treatment services. I look forward to working not only on this committee but on the Labor, Health Committee to try to see that we can do more to offer meaningful treatments that will mitigate the recidivism rate, which I know is one of the leading causes of people being incarcerated, is the constant recidivism, which could be really addressed if we had adequate treatment in our correctional systems. Following on your comment earlier, Mr. Chairman, about what we can do to have grace within our corrections system, I wanted to make that point.

Thank you. I appreciate your comments.

Justice KENNEDY. Thank you.

Mr. WOLF. Mr. Vitter.

IMPACT OF TECHNOLOGY

Mr. VITTER. Thank you, Mr. Chairman. First let me say it is a real honor to be here as a new member of the subcommittee and the committee. I know the comments and views of Mr. Serrano, Mr. Obey, and Mr. Kennedy are very sincere. I just want to say the obvious which is on all of those things, there is a wide spectrum of opinion on this subcommittee, in the Congress, in the Nation. I really don't want to say more than that, because I appreciate Mr. Serrano's first comment.

I am a little uncomfortable about having you here and bringing all of these things up. I had never heard the suggestion that we maybe follow a different procedure, but I think it is quite frankly a very interesting one.

Also, Mr. Rogers said it is difficult for him as a Congressman to treat the Court fairly and ask for nothing in return. I am not sure after this hearing we are really doing that, because it is a big lobbying session, and we all have our personal passions.

I wanted to ask Justice Thomas, on the technology side, if he could tell us a little bit about how over time that might change or impact public access and interaction with the Court. I guess I am

thinking of two groups. First, lawyers and things like electronic filing and that sort of thing; and then the public at large, and your thoughts or the Court's thoughts about evolving issues like audiotapes that we saw last fall.

Justice THOMAS. With the audiotapes, that is a separate issue. That has more to do with how close to real-time our proceedings will be made public in electronic form.

With respect to the role of technology in what we do, let me make that—let me do it in a couple of ways. One, let's just take the very intense period of the Florida election cases, the enormous number of filings that occurred then; the amicus briefs, the party briefs, the distribution. How do you accommodate 12, 13 separate filings over a weekend? How do you receive it and distribute it, and yet have no line before the Court, no one waiting on opinions, no one lined up to bring briefs to the Court? Because it was done electronically. The only way that could have been done was electronically. It would have been a logistical nightmare if we could not receive the briefs electronically, clean them up, distribute them and have them on our Website almost instantaneously.

So that has changed dramatically. People are able to learn about the Court in a different way simply by going to our Website. The schedule of the Court, the arguments, the briefs, the decisions all appear on the Website almost instantaneously. Years ago, you had to go to a service to see what the Court was doing. We can now in the emergency cases, I can sit at home and receive emergency petitions right at my desk. I can print them out if they are too long, print them out on my printer, or just read them on the screen and communicate instantaneously with my law clerks. I can do that anyplace in the world. We couldn't do that before. I can do it in a secure manner. I can edit opinions from home. I can edit opinions from California, or a hotel room in Nebraska or Iowa.

So it has changed that. It has changed the way that we are able to—I will give you an example: the pro se petitions. One of the problems we had in the past with them was they would file something very close to the deadline, it would be incorrect, we would send it back, and then when it came back, it was out of time. That sounds like a simple problem to us and a minor problem. Well, it is a big problem for them.

Now what the clerk's office does is simply go to the site, make the correction, let's say it is a cite to their case, and file it for them. That takes a couple of minutes, simply because we can access their Website or the Court's Website.

I think as far as research, we can now tap into databases that we couldn't in the past, instantaneously, from home, from work, on the road, et cetera. Lexis-Nexis, Westlaw, et cetera. I think what you are going to see is more of the same in the future. We are able to run the Court better, to have data necessary for the operations of the Court in real-time. I am able to communicate with my colleagues almost instantaneously in writing. I think you are going to see more of the paper disappear and more of our work done simply in front of a computer screen, whether it is cert petitions or other matters.

ELECTRONIC FILING

Mr. VITTER. With regard to filings you were talking about last fall. I didn't understand if it is the norm around the year or not. Are electronic filings the norm now?

Justice THOMAS. It is not the norm now.

Mr. VITTER. Are you going to move to that either being voluntary or mandatory?

Justice THOMAS. In some instances, in the death cases, for example, it is the norm because—that is why I said in the emergency cases we are using it. I think it is inexorable that we are moving toward that. To give you an example of a case, last year we had a case in which the entire case was filed on a compact disk. The references to Supreme Court opinions or to statutes were hyperlinked to the index and the joint appendix. So if there was a reference made to a statement by a party and that reference, that cite, was hyperlinked, you clicked on that and you were instantly at that quotation in the joint appendix or the relevant statute or the relevant case. That is immeasurably helpful for the future and it is obviously the way we are going. That is why it is imperative that we now get caught up, because it is going to move I think even more quickly in the future.

Mr. VITTER. Is there a time frame either that has been set or that you think is coming generally, where in every case before your Court electronic filing is possible, although not mandatory?

Justice THOMAS. We do not have a time frame. It would be, I think, imprudent of me to suggest that we do. I think, though that it is not too distant. That is why I have been more pushy about the Court coming of age.

Mr. VITTER. And presumably in the general category of cases, not death cases, not exceptional cases, but in the general category of cases, when that happens it would be voluntary and not mandatory?

Justice THOMAS. I don't know. I would like to see it at least be an option, because it is a lot easier for me to do my work if the briefs and the cases are distributed electronically. What I do even now with my law clerks is have them give me copies of all the cases electronically, so when I open up my laptop, when I go into my laptop, I can read all the relevant cases from my computer. It may at some point be optional. But I would like to see us have the disk at least, together with the hard copy, because some members of the Court still like to use a hard copy. So if we had both, it would be a lot easier. Right now, some of that is already reduced electronically, and we can pull it up.

TECHNOLOGY AND POLICY

Mr. VITTER. The final question in this line: How does all of this technology interplay with the separate policy issue of audiotapes, video, of Court hearings, et cetera? Is the advancing technology in any way impacting that issue of what the Court will allow over time?

Justice KENNEDY. They are separate issues. We had audio of the Bush v. Gore case, because the case came upon the country and us so fast that the legal system had not had the opportunity to absorb

it, to comment on it. We thought release of the audio—the audio was released immediately after the Court hearing—was in the public interest.

I think we will not do that unless—and I hope we don't have—have another case where the time compression is so great. You could have an Oxford debate, Congressman, as to whether or not television should be in the courtroom and you could pick either side of that one and make a pretty good case for it. It would be wonderful for the attorneys who were going to appear before the Court. I have taught law school by video. It is a wonderful teaching tool.

On the other hand, we teach something by not having it. We teach that we have this different function, this different methodology, this more formal way of proceeding. Many of my colleagues, I don't have many colleagues, but some of my colleagues say that it would affect the way they ask counsel questions, and they think it would alter oral argument for the worse. I am prepared to accept their judgment on that point.

Mr. VITTER. Thank you.

Mr. WOLF. Ms. Roybal-Allard.

HIRING LAW CLERKS

Ms. ROYBAL-ALLARD. Thank you, Mr. Chairman. I would like to join my colleagues in welcoming you this morning. I would like to follow up on some of the questions that have already been asked. One has to do with the hiring of women and minorities, specifically as law clerks. I understand that you hire, as you said, from the top of the class.

There is a great deal of concern in that as long as we have an educational system in this country which is not equal, that if you go into districts such as the one that I represent and you see the conditions under which children have to go to school, assuming they are even in a building, often they are in these makeshift places where there are leaky roofs, if it rains they have to put trash cans out there to collect the water, children can't be in the classroom, they have no places sometimes to have lunch.

In other words, the point I am making is their conditions are not conducive to learning. As a result, they are hindered in being able to excel in their education. Nevertheless, there are many students, in spite of these conditions, who still manage to get through the system, go to college, excel, and go to law school. But because of the fact that they have to work sometimes two and three jobs and have other responsibilities, they are not going to the Ivy League schools and they are not going to be at the top of the class.

Given that, there have been studies that have shown that being at the top of your class does not necessarily make you the best doctor, the best teacher, and I assume probably not the best lawyer.

Has there been any thought at all in revisiting the criteria that you use? I know at one time if you went to an Ivy League school, that was the best chance you had. Now, as has been stated, there is a recognition that there is part of the United States that is west of the Mississippi, and so now you are looking at other schools on the West Coast and in other parts of the country.

Has there been any thought at all, even in terms—and I don't know how your system works—a pilot or something where there

would be some opportunity, based on other criteria as well, to give opportunities to some of these students who may not, for reasons that I have already described, be at the top of the class but nevertheless still have the talent and the ability and the intellect, all the things that are necessary in order to be a law clerk?

Justice KENNEDY. The demands of the hiring process and the demands of the position where they have to come to our Court and be off to a fast, running start are such that I have to say great weight is given to scholastic performance. It is a measuring criteria that we rely on. We have professors from time to time who say, I've got a really great young person, he or she is not at the top of his class, and then we will hear the story.

I have had a high school dropout with me. I have had a couple of clerks whom I thought weren't quite ready but they looked so good, I asked them to practice for a year so they could come back. We can make small adjustments in this way. Ultimately, Congresswoman, it is a society-wide problem. It is a problem for our education system. It is a problem for law schools. Law schools are good about this. Law school professors have written about this. When they see it in front of them, they have good instincts and the mechanics to make some adjustments. I think that will continue.

Ms. ROYBAL-ALLARD. So you aren't completely closed to any outside recommendations of students that aren't necessarily at the top of their class?

Justice KENNEDY. No.

BUILDING RENOVATION COST

Ms. ROYBAL-ALLARD. The other question that I had was a follow-up with regards to the renovation project of which I would be very, very supportive. I understand very well the conditions that exist today. I look forward to actually touring it so that I can see first-hand, other than just having read about it.

Justice KENNEDY. We will let you see it before and after, Congresswoman.

Ms. ROYBAL-ALLARD. The statement, I guess it was due to prompting of then-Chairman Rogers, that the cost went from about $140 million down to, I understand it is currently now to $122 million. My question is, in terms of the difference in the cost, what parts of the project were actually abandoned to bring down that cost? And is it something that just in 5 years from now you will be coming back and saying we need X, Y, and Z because we were unable to make it as part of the original project?

The reason I am asking that is originally, as was mentioned, the estimate was somewhere between 7 to $20 million. This was a few years back. And so as time goes by, the cost keeps getting more and more expensive. That is why my question is what have you abandoned, and is it something that you will come back in 5 years to ask for? And will it be that much more expensive than it would be if we were to fund it today?

Justice KENNEDY. On the 7 to 20 and then the giant leap to over 100, it was simply because we had no knowledge at all that the basic systems had to be replaced. As to the 140 and what have we trimmed out, really no necessary improvement has been deferred or eliminated. There was some talk about refurbishing historic

paint colors, which is tremendously expensive. You have to chip off layer by layer to see what the original was. We told them that we wanted to not make that a high priority. That was the kind of suggestion we made in order to get the numbers down. They just took a good hard look at the numbers.

Ms. ROYBAL-ALLARD. So this funding basically is for all that is absolutely necessary.

Justice KENNEDY. It is not only what is absolutely necessary, it will be an absolutely first-class building insofar as we understand it. We have no idea of having some second-tier projects that would come——

Ms. ROYBAL-ALLARD. But no corners have really been cut. I guess you would consider it "frills" in terms of what you were talking about, I heard that term used, in terms of the renovation of the paint and that type of thing.

Justice KENNEDY. A few of those frills, but other than that, I think this will be an absolutely first-class building.

Ms. ROYBAL-ALLARD. Thank you.

BUILDING RENOVATION DISRUPTIONS

Mr. WOLF. Mr. Latham.

Mr. LATHAM. Thank you, Mr. Chairman. I want to welcome both of you here. I always wondered how you select who has the opportunity to come up here. You draw the short straw or something. Maybe there is a procedure in place.

Justice KENNEDY. It is our pleasure to be here, Congressman.

Mr. LATHAM. Thank you. That is very kind.

Mr. VITTER. They choose the most diplomatic justice.

Mr. LATHAM. I think I mentioned last year, I want to especially thank Justice Thomas for all the courtesies that you have given my folks when they are in town here, being admitted to the Court. It is really extraordinary, which you do, the reception and the courtesy you extend. It is very much appreciated.

I think this hearing today really shows how much we miss Julian Dixon on this subcommittee. His voice is very much missed today, I will say that.

And I do want to associate myself with what Mr. Obey said about outside income or honoraria. I just think there is an inherent conflict there.

As far as a question, I guess it is going to the infrastructure situation. A couple of things. Why has this request now come, and should we not have been doing some of these things over a period of time? And if all of this is approved, what type of disruption will there be for the Court itself? Do you expect any disruption or problems in that regard?

Justice KENNEDY. We have been assured that our operations can continue. We have also been told that we are not going to like it and it is going to be inconvenient. I have heard the good news and the bad news.

Mr. LATHAM. It is kind of like this hearing room.

Justice KENNEDY. We do think it is very important that we continue in operation in the building.

Mr. LATHAM. Is there a reason——

Justice KENNEDY. So far as the reason why this came on us all of a sudden, I guess we have just been reading our law books. We haven't been in the basement.

Mr. LATHAM. And no one else has been down there. The Architect hasn't been around there.

COURT ROOM CAMERAS

Going a little bit with, I guess what Mr. Vitter was talking about with the oral broadcast, the broadcast of the audio last year, has there been any renewed discussion as far as videotape between justices? I know Justice Souter last year said that they would have to probably carry his warm dead body or cold dead body out of the place before that would happen. Has there been any additional discussion?

Justice KENNEDY. As I have indicated, I think you could make a reasonable case on either side, but so long as my colleagues, or some of them, feel very strongly about it, I think there is a very good case for keeping the cameras out of the courtroom and they will remain out of the courtroom.

Mr. LATHAM. Would you reiterate the case for that?

Justice KENNEDY. We are in a culture that is obsessed by celebrities. We don't think we should become people that are regularly on the television, because it distorts the meaning of our work. Our work is not our personality. It is the language and the knowledge of the law. We are a collegial body. We think and argue and reason about cases over a long period of time before we issue them. We think that that process would not be reflected adequately by television cameras. We also think it would affect the way in which justices interact with the attorneys asking the questions and the dynamics of the oral argument.

We love the dynamic of our oral argument. Most people that are visiting the Court for the first time think it is a series of dialogues, a conversation between the two of us and then the other justice who has questions. It is really the justices who are talking among themselves and the attorney enters into the conversation. It is a thrilling dynamic if it works right. Sometimes it works right, sometimes it doesn't. We think television would just intrude on that dialogue.

Justice THOMAS. I happen to be one of those who is on the other side, who feels pretty strongly we shouldn't do it. I think it would compromise, it will not enhance, our process for us. And ultimately we have to decide these cases. I think that even with the public display, exposure, that we have now in the oral argument, it has some effect on our processes.

The other thing that is of concern to me that wouldn't affect me, would affect me only marginally but would have an effect on some of my more private colleagues, is security. I think we underestimate the security implications, the total loss of anonymity.

I thought I had anonymity in England when I went some years ago, and as my wife and I are joyfully walking down the street saying, finally I'm free from the burden, the loss of anonymity, and two individuals walked up to me and yelled, first of all yelled out my name to everybody and announced who I was. And there I was. I think that that is a concern.

I also don't think that it will significantly enhance the public's view of the case. These cases usually involve very arcane issues, or many of them, not all of them, statutory construction; and they require that you read the briefs and the supporting cases. Without that, then it is just simply personalities. I think that there is a cost. I think eventually there may be pressure to do it, but I think there is a real significant cost.

HONORARIA BAN

I would like, though, just a minute to comment on your point about the honoraria. I am not here to debate that issue, but I think you are talking about two separate things. I don't mean to comment on it in Mr. Obey's absence, but you raised it again. The argument was that currently members of the judiciary are allowed to speak to certain organizations, or to teach. There are certain acceptable groups. Certainly you couldn't speak to General Motors. We don't do that, because then we would be in a position where we are compromising ourselves. But the issue was whether or not—right now you are limited. There is a cap on your outside income from that. The underlying issue was to raise that cap, not to now say that we will change the audience. You see what I am saying?

For example, if you teach at the University of Iowa, then you would not say that the University of Iowa were compromised if that were judged. Or the individual taught at Drake, it wouldn't compromise. There is a difference between the audiences we are talking about. There are some audiences that are, by their very nature, objectionable from ethical standpoints. I think there can still be an objection to the honoraria ban, to raising it or eliminating it, but I think we have to talk about the same things.

Justice KENNEDY. I make a sharp distinction between honoraria, which I never take and do not think judges should ever take, and outside teaching. Those are two different things.

I will refrain from commenting about judicial salaries only because I am not sure it is within the scope of your hearing, or if you are interested in our views on that subject. We think it is urgent, absolutely urgent, that Congress address this issue. There are two parts to the issue. One is failure to give cost-of-living increases, which results in salary erosion. The Congress, in our view, should take immediate action to restore our lost COLAs, but that just stops the erosion.

Then you have the base salary problem, and you are well aware of what that problem is because you face it yourself. It is a matter of routine. It is almost a ritual now in the justice's dining room, we know each other's former personnel; oh, our clerk has just left, he has gone with so-and-so firm, and he is making significantly more than we are. He or she was our clerk last year.

This is not fair to the justices. Ultimately it will cause the deterioration of the judiciary. We just cannot attract qualified people when we have this disparity with lawyers.

Congressman, there are people who are always going to think that you and I are overpaid, no matter what you are paid. There is no really clear standard, I think, for what it ought to be. In the judge's case, we can make the comparison with outside legal practi-

tioners. We had a quadrennial commission some years ago. If there are political problems with doing this, I think it ought to be done through the commission route. But I simply would be remiss, since the subject has come up, in not saying that this is a serious matter of serious concern to the judiciary not only for what it does to their own dignity and their own concept of their worth, but for what it does long term to keeping the judiciary of the United States as a preeminent professional organization. It is wrong, it is inadequate, and Congress has to address it in the way it best thinks will be appropriate.

Mr. LATHAM. I share your concerns very much. We often sit and visit about former colleagues here who go out and make five times more than what we do, also. There is a question about the two branches being separate but equal. There are many of us that come here and make far less than what we did in the private sector, too. It is not just the judicial branch that has the problem.

The politics was supposed to come out of this back with the reform, the automatic cost-of-living, all of this. A lot of us are frustrated with that, in bringing that up every election year, it seems like, and having to put people in difficult positions. That was supposed to be out of it. I would just have to say, I don't think it is unique in your situation compared to Congress either.

Justice KENNEDY. We routinely meet with our counterparts from abroad, and in the case of England and the European Court of Justice, we are the objects of patronizing sympathy because the disparity is so great. Really, you shouldn't put us in that position.

Mr. LATHAM. Thank you, Mr. Chairman.

PUBLIC SERVICE

Mr. WOLF. I was not going to comment on the issue, but I will. I will give you some of my own personal views. One, I think it is a valid issue that ought to be addressed. The Bush administration ought to address it forthrightly by appointing a Hoover commission, if you will, of individuals of such character and integrity so that no one questions it. So the message ought to go to this administration, if they do want to attract good, qualified people. I do think there is an opportunity to bring people together with a commission. I would urge the Bush administration, and you may urge them to do it. I would be very careful. I have thoughts that I wasn't going to get into, because of my respect for the institution.

There is another side to it, though. I don't want to take issue with anybody, but I want to make sure that my conscience and my feelings are clear. We are servants, public servants. I could go downtown and make a lot of money. I don't want to go downtown and make a lot of money. I will never, ever leave this institution to go lobby downtown with one of the good law firms. When I leave, I will go with a church group or go with a human rights group. It is service.

Those of us who have been given this opportunity—I ran for Congress in 1976 and lost. I ran in 1978 and I lost again. I ran in 1980. I took every penny that I had out of my retirement. I still haven't put it back in. I cashed in every insurance policy that I had to have this opportunity to serve. It is an unbelievable opportunity.

I can watch a show on 60 Minutes and see something about the persecution of Christians in China that drives me crazy, and come in here the next day and do something about it. In this room tomorrow morning, we will swear in a young Chinese American. The Chinese have his wife in prison in Beijing.

So I appreciate the opportunity to be involved in things that make a difference, that live on beyond this, the service. I wouldn't go with a law firm downtown for a million dollars a year.

I know you have a good point. I spoke to a Member of Congress the other day who said his daughter had clerked for a judge and has just accepted an opportunity with a law firm for $180,000. I think there ought to be a mechanism to pay fair and decent salaries. I would clearly support that. We supported it in this Congress last year with regard to increasing the President's salary; the thought of a CEO who is making so much, and then the President of the United States making so little.

I think the answer is to take it out of the political process, have a Hoover commission, someone of such integrity, so people say those people are good, and I believe them. I think that you could lead this issue and convince the American people both with regard to the judiciary, with regard to the executive branch, and with regard to the congressional branch.

I also go with Mr. Latham and Mr. Obey, though, on the honorarium. That is, I don't think there ought to be any honorarium, because we should work for the American people. We are public servants. We serve. So earnings ought to be paid for by the people we work for and not an outside group.

We are blessed. When I think of the times I used to hang outside the subway stops in Rosslyn, shaking hands to get this opportunity, I am just not going to complain about it. I think, let's get a commission, let's let the President put a good person in, let's make the recommendations and let's go out and us articulate here is why I think we ought to do that. We should do it in a way where one party doesn't lie in wait for the other party. And I think we have gotten ourselves into that. We have almost become our own worst enemy.

The last comment is I thank both of you for your testimony. I think it has been excellent. I will do everything I can to help you, and I know—I am going to recognize Mr. Serrano when I finish, we must do the rehabilitation, and reconstruction of the Court. I think you have made a case and I think Mr. Rogers has done an excellent job in bringing the numbers down. We will do everything we can to help you so that 5 years from now, 6 years from now, it is something not only that we are proud of, and you are proud of, but when our constituents come, the high school classes come, for the first time come to this city to walk into the Supreme Court and walk into the Nation's Capitol, they are protected with fire safety, and security, and that you have the most up-to-date, high-tech ability to do what you do. We are going to do what we can.

I will have the subcommittee staff work with maybe the Architect to set up a time in the next couple of weeks for Members and/or staff to go over and show them the ducts and show them the machinery and take them behind and let them see how dry the wood is and let them see the potential problems. I think that hopefully

we can do something that you will be proud of and the American people will be proud of. I want to thank you both. I think your testimony was very good. We appreciate it.

Justice KENNEDY. Thank you, Mr. Chairman.

Justice THOMAS. Thank you.

CLOSING REMARKS

Mr. SERRANO. Just one final comment and a pledge. I will join the Chairman in making sure that your needs are taken care of. It is so important to make sure, as the Chairman has said, that the American people, along with the respect we have for the Court, also treat you properly physically, in your surroundings, and also those who go visit.

Let me just end by joining the many people today who paid tribute to my late colleague, Julian Dixon, by suggesting that you pay attention to the issue that we brought up. I have to tell you that I think it is going to continue to be a problem if you continue to say that the only way you can identify clerks is by working with local judges who pick the best students in the class. I refer to you the history of the Court itself. When a nominee comes up, you will always find people on the other side who feel that the nominee is not up to the job. Traditionally, such nominees have then been appointed to the Court, and gone on to do a very good job, served their country well.

So if that can happen to Supreme Court nominees who are seen by a segment of the population as not being up to the job, then certainly we can find people other than the one who was a master at tests somewhere, and in the process take care of a problem that still exists.

I thank you for coming before us today.

Mr. WOLF. We are adjourned.

QUESTIONS FOR THE RECORD
CONGRESSMAN JOSE E. SERRANO

MINORITY CLERKS

Question: Please provide for the record an update for the current year of the list submitted to the subcommittee last year regarding Supreme Court law clerks and the law schools they attended.

Response: The requested list is attached for the record.

Question: What steps have been taken to expand the pool of law clerks from which the Supreme Court selects clerks, to ensure that minorities are more adequately represented?

Response: Law clerks are hired by Justices individually. Justices generally advise those screening applications to take careful steps to encourage qualified minorities to apply so that they can receive adequate consideration.

QUESTIONS FOR THE RECORD
CONGRESSMAN HAROLD ROGERS

BUILDING IMPROVEMENTS AND RENOVATIONS

Question: Justice Kennedy, while I can understand the Court's desire to receive all of the requested funds up front to ensure continuity, is it not possible for this project to proceed in phases, whether that's doing one element at a time, or parts of each element simultaneously?

Response: The Supreme Court building, unlike the White House, the Capitol, and other federal buildings on Capitol Hill, has not been renovated since it was completed in 1935. Life safety, security, and essential building system requirements have all advanced greatly since that time. Virtually all of the building systems have far exceeded any reasonable life expectancy, and they require an aggressive daily maintenance schedule to continue operating. A number of the original manufacturers have discontinued the production of spare parts or are out of business. The Supreme Court building needs these renovations just to meet current life safety standards.

In response to the specific question whether it is possible for this project to proceed in phases, I believe the answer is no. First, we understand from the Architect of the Capitol (AOC) that it is not possible to fund a single construction project in phases because under federal contracting law, all funds must be appropriated before a contract may be awarded. Second, funding the project in phases so that multiple construction contracts are required would result in potentially dangerous and costly construction difficulties. It is necessary to provide for the modernization of the United States Supreme Court Building as a single project because:

A. The Supreme Court building will continue its operations throughout the project. There is no plan to shut the building down, except for discrete areas during a predetermined sequence of construction.

Construction will have to be carefully coordinated with the Court's calendar, which is

planned about a year in advance.
Given the nature of the Supreme Court's work, it is critical for both efficiency and security that construction occur in each occupant's workspace only once, rather than multiple times by multiple contractors.

B According to the AOC, existing life safety, security, and essential building systems need to be replaced or added to simultaneously.
- These systems must be fully integrated with compatible electronic controls to communicate seamlessly and complete tasks required by contemporary life safety systems.
- Under federal procurement requirements, it is not possible to purchase multiple parts of one manufacturer's system under separate construction contracts, and then to make the last contractor responsible for the proper operation of a completed system with parts installed by other contractors. It would be impossible to obtain a comprehensive warranty for all the components of a system installed under multiple construction contracts.

C. The AOC advises us that if construction were to be phased using separate contracts, there would not be a single point of contractor accountability for the integration of systems. If there are separate construction contracts, it is likely that each vendor would expect to be able to supply its own equipment, thereby creating a system that would require a wide variety of mechanical-electrical repair parts. More specifically, the AOC advises us that:
- Since each construction contract would be based on federal procurement requirements, a variety of equipment vendors must be allowed to bid and may have to be accepted.
- Equipment supplied by a multiplicity of vendors would increase the risk of unpredictable systems performance and significantly increased maintenance cost and difficulty. Making equipment that has been supplied by several vendors fully compatible is often expensive and time consuming. There is always the likelihood that certain features may never work properly.
- With multiple construction contracts, the government must accept incomplete systems without knowing if they are fully operable. Then, the government would be at risk for the cost of any corrections necessary to make the completed systems operable, with the possibility that the systems would never be fully operable.
- With multiple construction contracts, it would be difficult to make the switch over from existing to new mechanical-electrical systems.
- With multiple construction contracts, the government must maintain partially completed systems while operating existing systems.
- A single construction contract that offers a single point of accountability, with no lapses of time between multiple construction contracts, is the most efficient and cost effective way to keep existing systems running until there is a change over to new systems.

D. The AOC also points out that systems are generally integrated through the building vertically, although construction would be undertaken horizontally, since each floor level tends to have similar equipment. For example, the basement houses the air-handlers which feed the main vertical distribution chases, while the upper floors have horizontal local distribution systems.

E. The AOC also believes that multiple construction contracts would cost more and project completion would take longer due to general conditions (contractor bidding and contracting expense, mobilization, moving on and off the site, construction equipment and supplies, etc.). Also, the longer a project takes, the more the total project will cost

due to inflation alone, which the AOC believes may be in the range of $3-4 million per year.

Question: This committee funds major construction and renovation projects in phases every year. Whether it is military housing, flood proofing, dam stabilization, or highway construction, these too have interrelated elements that are funded in subsequent phases. What makes this project different from any other major construction or renovation project?

Response (provided by the AOC): There are some significant differences between this project and some of the types of projects referenced in the question. Highway construction, flood proofing, dam stabilization, and other major infrastructure renovation projects can be completed without the complexity of dealing with occupied and continuously functioning facilities. Furthermore, in most cases, these projects do not deal with life safety issues, which in the case of the Supreme Court building are quite serious. As stated earlier, the building has not had a major systems upgrade since it was completed in 1935.

While military housing quite often deals with life safety issues, the work is done without the facilities being occupied and the work for military housing involves systems that are far less complex than those required by Code for a building such as the Supreme Court.

Question: With such an enormous scope and size, doesn't it seem possible that additional unanticipated needs will arise?

Response (provided by the AOC): There is always a possibility that unanticipated needs will arise in any construction endeavor. In construction projects the most likely circumstance is unanticipated inflation caused by unusual economic conditions. The design team is taking measures to manage unanticipated needs by employing best practices to maximize success. Some of the measures are:

- Hold progress meetings frequently to facilitate communications among the design team and to monitor any developing scope, schedule, and cost issues.
- Review drawings and specifications at various milestones to control the project scope and schedule.
- Review construction cost estimates at various milestones to control the project cost.
- Utilize a construction manager to provide constructability reviews and to make constructor recommendations for managing the project scope, schedule, and cost.
- Include appropriate contingencies in the project budget to allow for unanticipated needs. For example, a peer review of the project was held in 2000, which validated the contingencies included in the construction cost estimates.

Furthermore, the Modernization of the United States Supreme Court project is being defined for a specific scope of work and construction cost. If, in the future, the Court encounters unforeseen conditions, they will be brought to the committee for consideration.

Question: If the answer is yes, it appears then that this subcommittee will be required to review and appropriate additional money on a yearly basis anyway. What then would be the reasons for not taking this one step at a time to make sure this committee continues to have proper oversight?

Response (provided by the AOC): As noted above, we do not believe it is feasible to divide the project up into discrete parts that can be funded separately. We believe, however, that steps can be taken to assure that project progress reports are made available to the Committee so its oversight role can be met. The Architect's Office can provide project progress reports on a quarterly basis.

Question: I notice in the budget justifications that there are $960,000 in identified out-year needs related to the renovation which you are not asking for this fiscal year. While they are minimal expenditures compared to the rest, you obviously feel these can wait. Why aren't these out-year needs budgeted up front as well?

Response (provided by the AOC): Some of the projects projected for the out-years are outside the scope of the building modernization -- for example, sidewalk repair and stone conservation. The X-ray machine replacement request is based on an equipment replacement cycle and is not affected by the building modernization. The upgrade to the fire suppression system in the kitchen exhaust will likely be undertaken as a maintenance item. Future budget requests (FY 03 and beyond) will reflect any necessary changes related to these items.

Question: For example, the justifications list $125,000 for replacing the steam humidification system. This too is obviously a matter of safety and involves basic upgrades. If we're trying to maintain continuity, why isn't this being done when you replace the heating and ventilation system?

Response (provided by the AOC): The steam humidification system, since it is part of the existing air handling system that will be replaced, will be constructed as a part of the Modernization of the United States Supreme Court Building project. Future budget requests will reflect that this project will not need to be funded separately.

Question: Another example of out-year requests is the $150,000 for flat roof replacement. Why shouldn't this be done at the same time you're upgrading your roof fall projection standards?

Response (provided by the AOC): The flat roof replacement may be constructed as a part of the Modernization of the United States Supreme Court Building project, or separately. It is a small piece of the building that can be accessed for repair and no other roof work is contemplated for the overall modernization project.

SECURITY

The questions you asked were precise. We value and appreciate your questions as they help us better understand the project. The original responses from the Architect of the Capitol seemed to us somewhat ambiguous, and we asked for clarification. We enclose their amended answers.

Though it is still not completely clear to us how the various subcontractors' costs have been allocated, all of our advisors tell us the allocation is based on sound estimates. In order to continue to provide more precise information that we as lay people can understand, the Architect

of the Capitol is going to use additional outside consultants to verify answers to questions such as yours and other questions we may have regarding costs.

In the meantime we hope that, based on the estimates now in hand, the appropriation can go forward.

Question: I am interested in how you arrived at your figure for security upgrades. You're asking for $27.86 million for police facilities, visitor screening, and window enhancements. How much do you estimate on spending on each of these elements?

Response (provided by the AOC): Throughout the design of the project, a professional construction cost estimator has been preparing estimates at certain points during the design process for the modernization of the United States Supreme Court Building. The estimates for police facilities, visitor screening, and window enhancements were obtained by identifying applicable costs for each in the construction cost estimate for the modernization project. These estimates are not construction costs for the security upgrades as separate projects. Rather, security upgrades and all the design drawings and specifications are integrated with all other drawings and specifications in the modernization project and share building systems such as mechanical, electrical, plumbing, etc., general conditions (contractor bidding and contracting expense, mobilization, moving on and off the site, construction equipment and supplies, etc.) and economy of scale with the modernization project. Thus, the cost estimates for police facilities, visitor screening and window enhancements include pro-rated allocations for these shared costs based upon the assumption that the modernization will proceed as one project. Based on the most recent estimate update, the estimate for police facilities is $16,430,763. In addition to shared costs, this estimate includes the cost of constructing the underground annex, mechanical, air handling and security systems for the annex and equipping a modern police command center in the existing basement of the building. The estimate for visitor screening is $2,569,014. In addition to shared costs, this estimate includes the costs of consolidating visitor screening in one portion of the building. the estimate for window enhancements is $13,723,338. In addition to shared costs, this estimate includes the costs of manufacturing, installing and anchoring more secure windows. the combined estimate is $32,723,115. The total estimate for security upgrades is greater than the amount requested in the FY 2002 appropriation because it reflects the anticipated total cost, including a portion of amounts previously appropriated for design. Also, the completion of more design work in the months since the budget request was prepared has prompted an update of the estimates. The total estimate for the modernization project remains the same.

Question: How essential are these? Do you feel the court and its visitors are vulnerable in any way?

Response: As noted at the outset, the Supreme Court building, unlike the White House, the Capitol, and other federal buildings on Capitol Hill, has not been upgraded since it was completed in 1935. Security requirements have advanced greatly since 1935. Today, all buildings on the Capitol campus must be considered potential targets. The Supreme Court building needs to be brought up to current security standards to enhance protection of the building and its occupants.

Question: I understand there are a couple of options being explored for visitor screening locations. What's the status? Has a decision been made?

Response: The Supreme Court has identified a specific area for visitor screening that will be incorporated into the project.

Question: If so, explain your decision. If not, when do you anticipate that decision will be made?

Response: The Supreme Court made its decision after reviewing options presented by the design team in consultation with security experts.

Question: I also understand that the Justices are debating how far to go on their window enhancements. Any reason why having both blast and ballistic resistance would be a bad idea? Has there been a decision on that?

Response: The Supreme Court is currently reviewing options for window enhancements that were presented by the design team in consultation with security experts.

LIFE SAFETY

Question: The budget proposes $20.17 million for life safety issues, which includes installation of a sprinkler system. Do we know the cost of this particular element?

Response: (provided by the AOC): Based on a professional construction cost estimator's evaluation, the fire sprinkler estimate would be approximately $11,850,352. The estimate for a sprinkler system was obtained by identifying applicable costs in the construction cost estimate for the modernization project. As with the security category, the fire sprinkler estimate is not the construction cost for the fire sprinklers as a separate project. The sprinkler system is integrated with all other drawings and specifications in the modernization project and shares building systems such as mechanical, electrical, plumbing, etc., general conditions (contractor bidding and contracting expense, mobilization, moving on and off the site, construction equipment and supplies, etc.) and economy of scale with the modernization project. Thus, the cost estimate for the fire sprinkler system includes prorated allocations for shared costs based upon the assumption that the modernization will proceed as one project.

Question: I have the same question for the proposed fire alarm system -- what is the cost? Are there particular parts of the building that need to be addressed first?

Response (provided by the AOC): Based on a professional construction cost estimator's evaluation, the fire alarm system estimate would be approximately $4,643,065. The estimate for a fire alarm system was obtained by identifying applicable costs in the construction cost estimate for the modernization project. The fire alarm system estimate is not the construction cost for the fire alarm system as a separate project. The fire alarm system is integrated with other drawings and specifications in the modernization project and shares building systems such as electrical,

mechanical, plumbing, etc., general conditions (contractor bidding and contracting expense, mobilization, moving on and off the site, construction equipment and supplies, etc.) and economy of scale with the modernization project. Thus, the cost estimate for the fire alarm system includes prorated allocations for shared costs based upon the assumption that the modernization will proceed as one project.

In advance of the modernization project, interim fire safety system improvements are being made to certain areas in the Building. Installation of the upgrades should be completed by this fall. The work includes expansion of the smoke detection system in the attic and other areas; replacement of existing fire pumps and controllers in the basement; and upgrades to the existing fire alarm and smoke detection control panels. The interim fire safety system improvements are being coordinated with those planned for the modernization project, and will be integrated into the completed project.

Supreme Court of the United States
Washington, D. C. 20543

LAW CLERKS - OCTOBER 2000
LAW SCHOOLS AND PRIOR CLERKSHIPS

CHIEF JUSTICE REHNQUIST:

Sobota, Luke A.	University of Chicago University of Chicago Law School	Judge Pamela Ann Rymer U. S. Court of Appeals Ninth Circuit Pasadena, CA. 91105
Stancil, Mark T.	University of Virginia University of Virginia School of Law	Judge David M. Ebel U. S. Court of Appeals Tenth Circuit Denver, CO. 80257
Strauber, Jocelyn E.	Duke University School of Law	Judge A. Raymond Randolph U. S. Court of Appeals D. C. Circuit Washington, DC. 20001 1998-1999

JUSTICE STEVENS:

Penalver, Eduardo	Yale University Yale Law School	Judge Guido Calabresi U. S. Court of Appeals Second Circuit New Haven, CT. 06510
Siegel, Andrew M.	New York University School of Law	Judge Pierre N. Leval U. S. Court of Appeals Second Circuit New York, NY. 10007
Voigts, Anne M.	Columbia University Columbia Law School	Judge Stephen Reinhardt U. S. Court of Appeals Ninth Circuit Los Angeles, CA. 90012

JUSTICE O'CONNOR:

Bierschbach, Rick A.	University of Michigan School of Law	Judge A. Raymond Randolph U. S. Court of Appeals D. C. Circuit Washington, DC. 20001 1997-1998

Mason, Jennifer M.	New York University School of Law	Judge Alex Kozinski U. S. Court of Appeals Ninth Circuit Pasadena, CA. 91105 1998-1999
Matthews, Tamarra D.	Yale University Yale Law School	Judge Judith Rogers U. S. Court of Appeals D. C. Circuit Washington, DC. 20001
Panikowski, Stanley J.	University of Virginia University of Virginia School of Law	Chief Judge J. Harvie Wilkinson III U. S. Court of Appeals Fourth Circuit Charlottesville, VA. 22902

JUSTICE SCALIA:

Martin, Kevin P.	Columbia University Columbia Law School	Judge Laurence H. Silberman U. S. Court of Appeals D. C. Circuit Washington, DC. 20001
Poon, Julian W.	Harvard University Harvard Law School	Judge J. Michael Luttig U. S. Court of Appeals Fourth Circuit Alexandria, VA. 22314
Van Oort, Aaron D.	University of Chicago University of Chicago Law School	Chief Judge Richard A. Posner U. S. Court of Appeals Seventh Circuit Chicago, IL. 60604
Wolff, Eric B.	University of California, Berkeley School of Law	Judge Stephen F. Williams U. S. Court of Appeals D. C. Circuit Washington, DC. 20001

JUSTICE KENNEDY:

Dixton, Grant M.	Harvard University Harvard Law School	Judge J. Michael Luttig U. S. Court of Appeals Fourth Circuit Alexandria, VA. 22314
Gerry, Brett C.	Yale University Yale Law School	Judge Laurence H. Silberman U. S. Court of Appeals D. C. Circuit Washington, DC. 20001
Miller, Kevin J.	University of Chicago University of Chicago Law School	Judge Jerry E. Smith U. S. Court of Appeals Fifth Circuit Houston, TX. 77002
Paige, Eugene M.	Harvard University Harvard Law School	Judge Alex Kozinski U. S. Court of Appeals Ninth Circuit Pasadena, CA. 91105 1998-1999

JUSTICE SOUTER:

Bamberger, Kenneth A.	Harvard University Harvard Law School	Judge Amalya L. Kearse U. S. Court of Appeals Second Circuit New York, NY. 10007 1998-1999
Newsom, Kevin C.	Harvard University Harvard Law School	Judge Diarmuid F. O'Scannlain U. S. Court of Appeals Ninth Circuit Portland, OR. 97204 1997-1998
Van Houweling, Molly S.	Harvard University Harvard Law School	Judge Michael Boudin U. S. Court of Appeals First Circuit Boston, MA. 02109

Waxman, Matthew C.	Yale University Yale Law School	Judge Joel M. Flaum U. S. Court of Appeals Seventh Circuit Chicago, IL. 60604

JUSTICE THOMAS:

Cohn, Jonathan F.	Harvard University Harvard Law School	Judge Diarmuid F. O'Scannlain U. S. Court of Appeals Ninth Circuit Portland, OR. 97204 1998-1999
Comerford, Kathryn	Harvard University Harvard Law School	Judge J. Michael Luttig U. S. Court of Appeals Fourth Circuit Alexlandria, VA. 22314
Miller, Eric D.	University of Chicago University of Chicago Law School	Judge Laurence H. Silberman U. S. Court of Appeals D. C. Circuit Washington, DC. 20001
Scarlett, Ann M.	University of Kansas School of Law	Judge Pasco M. Bowman U. S. Court of Appeals Eighth Circuit Kansas City, MO. 64106 1998-1999

JUSTICE GINSBURG:

Bravin, Eric O.	Columbia University Columbia Law School	Judge David M. Ebel U. S. Court of Appeals Tenth Circuit Denver, CO. 80257
Gordon, Robert M.	Yale University Yale Law School	Judge Pierre N. Leval U. S. Court of Appeals Second Circuit New York, NY. 10007 1998-1999

Liu, Goodwin H.	Yale University Yale Law School	Judge David S. Tatel U. S. Court of Appeals D. C. Circuit Washington, DC. 20001
Lye, Linda C.	University of California, Berkeley School of Law	Judge Guido Calabresi U. S. Court of Appeals Second Circuit New Haven, CT. 06510

JUSTICE BREYER:

Leyton, Stacey M.	Stanford University Stanford Law School	Judge Susan Y. Illston U. S. District Court Ninth Circuit San Francisco, CA. 94102
Reinert, Alexander A.	New York University School of Law	Chief Judge Harry T. Edwards U. S. Court of Appeals D. C. Circuit Washington, DC. 20001
Robinson, Russell K.	Harvard University Harvard Law School	Judge Dorothy W. Nelson U. S. Court of Appeals Ninth Circuit Pasadena, CA. 91105 1998-1999
Spinelli, Danielle	Harvard University Harvard Law School	Judge Guido Calabresi U. S. Court of Appeals Second Circuit New Haven, CT. 06510

RET. JUSTICE WHITE:

Thai, Joseph T.	Harvard University Harvard Law School	Judge David M. Ebel U. S. Court of Appeals Tenth Circuit Denver, CO. 80257 1998-1999

WEDNESDAY, MARCH 21, 2001.

THE FEDERAL JUDICIARY

WITNESSES

JUDGE JOHN G. HEYBURN, II, CHAIRMAN, COMMITTEE ON THE BUDGET OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

LAWRENCE L. PIERSOL, MEMBER, COMMITTEE ON THE BUDGET OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

LEONIDAS RALPH MECHAM, DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS MEMBER, EXECUTIVE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

JUDGE FERN M. SMITH, DIRECTOR, FEDERAL JUDICIAL CENTER, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

Mr. WOLF. Good morning, ladies and gentlemen. Welcome.

This morning we begin our hearing for fiscal year 2002 appropriations and I want to welcome the new members of the Committee.

Mr. Serrano is on his way. The traffic in Northern Virginia was unbelievable. I was in the car for a long period of time and I know he lives south on 95 and they said there was basically an hour's delay, so he is on his way.

Also, Mr. Rogers wanted to be here, and I wanted to pay respect to Mr. Rogers. There is also a hearing before the Transportation Appropriations. He is there with regard to Amtrak.

Also, I am excited about the prospects for this year. We have a number of new members that have joined the Committee. This is the first time for me. It will be a learning experience, having been on the Transportation Appropriations Committee Chairman for six years.

But I am excited about the prospects and just learning and being part of this.

I would also say at the outset, before we hear your testimony, I have read all the testimony last night, underlined it, went through different parts of it, and I am sympathetic to what you are trying to do.

The problem that we are going to have this year is really going to be the size of the dollar allocations we are given. And while there is a four percent increase for most of the government, the courts are asking for more than that, as you know, I think it is 14 to 15 percent, if I read appropriately, but somewhere in that range.

Some other categories are actually getting more. And health care, cancer research, Alzheimer research, Parkinson's disease, diabetes, which I know we all support, and so therefore if you look at the four percent figure, someone else is going to get less.

And the numbers that I have seen with regard to this Subcommittee coming out of OMB are very difficult. We should probably get the OMB examiner you have to deal with, if you deal with one, and put his or her name at the beginning of the mark-up, so that if anyone wants to call, or maybe we could even send it out to all the judges around that issue. [Laughter.]

But if you would just perhaps during your testimony also cover how do you deal with OMB and how do you make the case. I think you all do an outstanding job. We have the most honest and ethical judiciary in the world.

But how do you deal with OMB? How do you work your numbers. And I know you do not have a cabinet secretary who goes before OMB. I used to work for Secretary Rogers, C.V. Morton, who would go over to OMB and argue these cases, sometimes successful, and many times not but would be there as an advocate.

How do you work it? Do you just submit them numbers? I would like to know, maybe if you want to do it on the record, or if you want to educate me some time, but we will try to do the best we can.

But I would ask you to understand, as we get into this process, with the numbers that I am seeing, it does look very, very bleak. And so but things change.

With that, perhaps since Mr. Serrano is not here, if you would like to, Ms. Roybal-Allard, if you would like to say anything since.

Ms. ROYBAL-ALLARD. I would just like to welcome you as Chair, and I look forward to working with you, as I know the rest of us do.

And I agree with your comments that it does look very, very bleak in terms of the budget and some of the monies that you are all going to need in order to do your work.

And I am sure, knowing the Chair, that in fact everything will be done to try and do the best that can be done, given the circumstances, to address your particular needs.

Mr. WOLF. Mr. Kennedy, I want to welcome Mr. Kennedy who is in fact a new member, and Patrick, if you would like to make a comment or say anything?

Mr. KENNEDY. No. I welcome you, Mr. Chairman, and I look forward to your serving.

Mr. WOLF. Thank you.

One last comment I would say. When, on the Transportation Committee, we had a very truly bipartisan, Mr. Sabo and I got along very well together. I know it will be the same this year.

Most of these issues are really not partisan issues. They are just good, common sense issues.

But with that, I welcome you. All your statements have been put into the record. I understand that you had a video that you want to show at one time whenever you think that is appropriate, but I will begin, Judge Heyburn, with you. Welcome.

Judge HEYBURN. Chairman Wolf, Congresswoman Roybal-Allard and Congressman Kennedy, it is a real pleasure for me to be here to represent, for the fifth time now, all of the judiciary, except for the Supreme Court and they, as in all matters, speak for themselves, and I gather they are going to be here next week before you to do just that.

These sessions really never cease to amaze me and remind me about great majesty and delicacy of our Federal Constitution. When one independent branch of government comes before another to give testimony and to ask for the resources to do what in fact the Constitution and the statutes which you have passed require us to do.

And it also never ceases to remind me about how important an independent judiciary is. It is what in many ways separates the United States of America from almost every other country. And what I am here today is to simply ask for the resources to do the job that you have asked us to do and which the Constitution requires us to do.

And that is to protect the rights of——

Congressman Serrano, welcome.

And that is to ask for the resources to do the job that we must do and that is to protect the rights of all our citizens to enforce the laws, whether they are good or bad, enforce the laws for the rich and the poor, to mediate disputes among our citizens, among our states, and our national government.

Before I go any further, I am going to recognize two important people that are here with me that represent important institutions within the judiciary and ask them to say a few brief words about——

Mr. WOLF. If I can just interrupt for a second. If I could just recognize Mr. Serrano. I was in the same traffic, and I understand. [Laughter.]

If you would like to make any comments or anything?

Mr. SERRANO. I certainly will, Mr. Chairman.

Let me first apologize. I am a man of extremes. I am a member of Congress who lives the closest to his district office and it could be argued that I live the longest distance way from the Capitol office. But even if I lived down the block on 95, it is always crowded.

I apologize for that.

I want to take this opportunity, Mr. Chairman, to tell you how pleased I am to see you as Chairman of this Committee.

Mr. WOLF. Thank you.

Mr. SERRANO. I offer you my support. I offer you my full understanding in trying to craft a proper bill together.

I want to take this opportunity to welcome Mr. Kennedy to our Committee, as well as Mr. Cramer, who will be serving with us. And we must not miss this opportunity, Mr. Chairman, to pay tribute to the memory of Julian Dixon who was a member of this Committee, a senior member of this Committee, who advised me quite a bit.

As you know, I said it on the floor, and I will repeat it one more time. I became Ranking Member of this Subcommittee without having served on it before. I came to it the first time as ranking member last time, so I had to turn to Mr. Mollohan, who had been Chairman, and Mr. Dixon for a lot of help.

And I established a great relationship with Harold Rogers, and I am looking forward to the same kind of relationship with you.

I assure you that I am usually here on time. [Laughter.]

This is unique, and I wanted to congratulate and to welcome our guests, and to tell you that we worked very closely last year, and we intend to try to help you in any way that we can.

Thank you.

Mr. WOLF. Thank you.

Judge HEYBURN. As I said, I want to recognize two individuals who represent important parts of the judiciary family. The first is Ralph Mecham, who is the Director of the Administrative Office.

Mr. MECHAM. Thank you, Chairman Wolf and members of the Committee. It is an honor for me to be here for the 17th time before the Subcommittee and twice before the legendary John Runey, and then starting in 1986 with Mr. Smith, and each Chairman thereafter.

Along with being director of the Administrative Office, I am also a member of the Executive Committee of the Judicial Conference of the United States, which is the policymaking entity for the judiciary, and I will be honored to serve on Judge Smith's board at the Federal Judicial Center.

It is a pleasure to be with you.

And Mrs. Roybal-Allard, I look forward to working with you. I tried in a feeble way to help your father get the building built in Los Angeles for the courts and others, and was happy to work with him, he was very effective.

I will stop at that point, Mr. Chairman.

Judge HEYBURN. And next I would like to recognize Judge Fern Smith, who is the Director of the Federal Judicial Center.

Judge SMITH. Mr. Wolf, members of the Committee, good morning. I do not have Director Mecham's long history. This is my second appearance, so Mr. Kennedy, I am not far ahead of the curve of you as far as this particular duty is concerned, but I consider it a privilege, both as the Director of the Federal Judicial Center, and also as an active District Court Judge for San Francisco.

I know that when I say to counsel who appear before me, counsel, I have read your papers, I hope they understand that it means there are certain things I do not want to hear again.

I heard you say——

Mr. WOLF. No, you are right.

Judge SMITH [continuing]. I read your reports, so if I could then, with your permission, just take two minutes to give a brief survey, maybe call it Federal Judicial Center 101, just to highlight the general things that we do before we get into the detail.

As I think you all know, the Center is the Federal Court's agency for education of judges and supporting personnel, and the bulk of our appropriation is spent for that purpose.

We also do a great deal of research analysis, primarily for Committees of the Judicial Conference, case management, judicial procedures, various issues like that.

We are probably best known for our orientation of new judges, but we do a lot of other things that are becoming increasingly as important. And I would hope that the record would reflect that. And I know that the questions and answers will do that.

But just as a couple of brief illustrations, in the last few weeks, we have presented an orientation seminar for magistrate judges, we have broadcast on the Federal Judicial Television Network, an

interactive program for United States probation officers on the special problems of white collar offenders.

We have put the last touches on a manual for judges on new technologies in the courts.

We have conducted a video conference orientation seminar for training specialists in the courts, and we have begun to activate a contingency plan for educating judges and support staff about the new bankruptcy law which is still in the works we understand, but we want to be ready so that judges will be ahead of the curve when that happens.

We have emphasized, in the last few years, our shift from traditional educational methods to distance learning, technology-oriented learning, and we are going to continue to do that without losing sight of how incredibly important face-to-face learning and idea exchange is for federal judges.

And finally, an area that consumes virtually almost none of our appropriation but is taking an increasingly important place in our agenda is providing assistance to emerging democracies who are interested in stabilizing the rule of law in their own countries and in trying to train their judges so that they too will have independent judiciaries and can take their place in a way in which they are anxious to do.

One example is the center we provided to the Puerto Ricans, the Center for Administration of Latin-American Justice, and that center is building on Puerto Rico's tradition of training Latin-American judges, prosecutors and defenders about the adversary system.

As countries throughout the Latin-American hemisphere try to adapt and do adapt to these new ways of doing things to have stronger judicial systems and a more stable rule of law, and so we think that is important.

As I say, we spend virtually none of our appropriation but put a great deal of heart and soul into it, and will continue to work in those areas.

We have also worked with many countries in Africa, Asia, et cetera.

I will stop then. I know that our full statement goes into this in detail. Thank you for your courtesy in giving me these few minutes.

[Written statement of Judge Smith follows:]

CURRICULUM VITAE

THE HONORABLE FERN M. SMITH

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E-mail fmsmith@fjc.gov

PERSONAL
Born in San Francisco, California.

EDUCATION
J.D., 1975, Stanford Law School
B.A., 1972, Stanford University, Graduated with Distinction, Phi Beta Kappa

LEGAL EXPERIENCE

7/99 - 7/03	**Director, Federal Judicial Center** Washington, DC
9/88 - present	**Judge, U. S. District Court for the Northern District of California** San Francisco, California (Inactive status 7/99 - 7/03)
9/86 - 9/88	**Judge, Superior Court of the State of California, in & for the County of San Francisco** - San Francisco, California Assignments included cases in Criminal Division and Juvenile Court.
9/75 - 9/86	**Bronson, Bronson & McKinnon** - San Francisco, California Associate, 1975-81 Partner, 1981-86 Member of firm's Management Committee, 1984-1986

Litigated and tried a wide variety of significant cases, ranging from aviation law in the representation of an aircraft manufacturer involved in the explosion of a DC-8 at Travis Air Force Base to mass tort litigation representing a major pharmaceutical company.

ADMINISTRATIVE/JUDICIAL ACTIVITIES

Chair, Advisory Committee on the Rules of Evidence, 1996 - 1999
Member, Advisory Committee on the Rules of Evidence, 1993 - 1996
Member, Ninth Circuit State-Federal Judicial Council, 1990 - 1993
Member, California Judicial Council's Advisory Task Force on Gender Bias, 1988 - 1990
Member, California Judicial Council, 1987 - 1988

Statement of Hon. Fern M. Smith,
Director, Federal Judicial Center

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March 21, 2001

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House Committee on Appropriations
Subcommittee on State, Justice, Commerce, the Judiciary
& Related Agencies

•

Honorable Frank Wolf, Chairman

Mr. Chairman, members of the subcommittee: My name is Fern Smith. I have been a U.S. district judge since 1988 and director of the Federal Judicial Center since 1999.

The Center is grateful for the 4.5% increase in our 2001 appropriation, our first current services appropriation since 1992. This statement summarizes our 2002 request and, to put that request in context, describes Center activities that serve our statutory mission: "to further the development and adoption of improved judicial administration" through education and research. I have grouped those activities under some major challenges facing the federal judicial system:

- fair and efficient disposition of litigation
- alternative methods of resolving disputes
- sentencing, offender supervision, and prisoner litigation
- science in the courtroom
- responsibilities under the codes of conduct
- court management
- implementing technological change
- globalization of commerce and crime; rule of law assistance to emerging democracies.

2002 Request

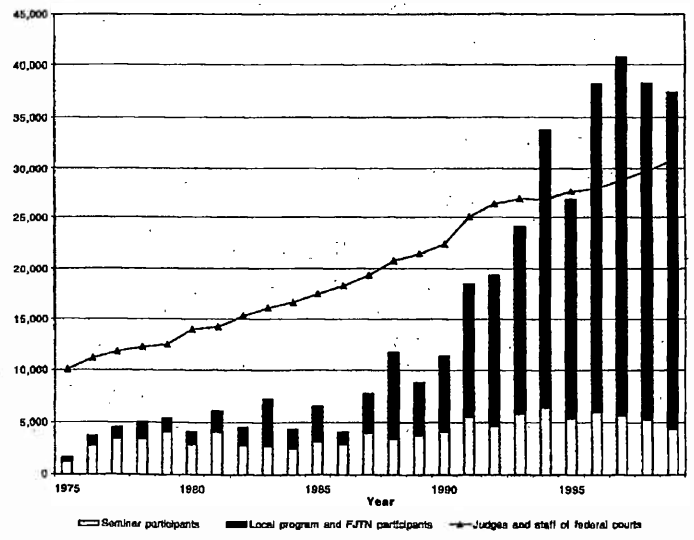
The requested 2002 appropriation of $20,323,000 is based on our recurring assessment of judge and staff educational needs as revealed by our advisory committees and surveys, and by actions of Congress, the Judicial Conference, and the Sentencing Commission. Our research program is structured primarily by requests from committees of the Judicial Conference. Research projects often provide the bases for our educational programs.

Basically, we seek in 2002 to increase our non-travel educational services to meet the growing demand for them while maintaining our education seminars, albeit at the reduced levels required by our appropriations. In all cases, our objective is to provide federal courts practical, job-related education that reflects competing, legitimate approaches to particular problems.

The Center's statutory Board, which the Chief Justice chairs, unanimously approved the request before you today. It represents an 8.5% increase, providing adjustments to base and ten automation and video positions. The request is consistent with the Center's long-term trend toward greater use of distance education—education that does not require travel. Over 90% of those who used the Center's educational services last year did so through distance education, or "e-learning" as some now say.

Last year, at the request of the subcommittee's chairman, the Center and the Administrative Office provided a paper documenting the judicial branch's use of technology. The following chart from that paper illustrates the Center's increasing use of e-learning.

Participants in FJC Seminars, and in Programs Using Distance Education, by Year



As explained in that paper, educational technologies include:

- *The Federal Judicial Television Network (FJTN)*—created in 1998 to transmit education and information by satellite to over 300 federal court sites where the Administrative Office has installed downlinks. The first results of a statistical method we created to measure FJTN viewership suggest that viewership of FJC broadcasts may be as much as 80% larger than informal estimates that were based on 1999 data.
- *Two-way videoconferencing*—for training that involves only a few locations.
- *Web-based education*—our internal judicial branch Web-site provides interactive tutorials, online seminars and workshops, and exchanges where court-training specialists throughout the country can pose questions to trainers who have dealt with particular problems, view other courts' training databases, and obtain electronic copies of resource materials.
- *Curriculum packages for in-court use*—the Center has prepared over 50 specialized training packages for court managers to adapt for their own training needs—for example, teaching probation officers to conduct financial investigations. These packages have instructional guides, outlines, overhead transparencies, and in some cases, video supplements.

In calendar 2000, excluding FJTN viewership, the 632 educational programs sponsored by the Center or using Center materials had 23,419 participants. Of those programs, 590 programs, with 20,351 participants, were distance education programs. In addition, we estimate that our FJTN programs had almost 30,000 viewers.

Since 1992, the Center's FTEs have declined by 16. The Center's appropriation was $18,895,000 in 1992 and is $18,736,000 in 2001, a decrease in current services dollars of more than $7,000,000. Meanwhile, the number of judges and court employees has grown, and the range and complexity of issues they deal with have expanded. A greater variety of educational technologies has helped us deal with increased educational requirements with a smaller staff and appropriation, but these technologies require skilled employees to support them. The requested program increase for 2002 is for ten additional positions to support our video and Web-based education.

Five of the additional positions are for our video staff, to allow us to update our educational programs on videocassettes and to meet demands for additional videos, while continuing to manage the FJTN as well as expand it to provide a full day's broadcast schedule for courts in the western time

zones. The FJTN's creation has significantly expanded our workload, but we have been able to add only one-and-a-half positions to our video staff by internal reallocations. The current staff manages the network for Center broadcasts (including those we produce with the Sentencing Commission) and for Administrative Office broadcasts. This entails producing live studio programs, operating the technology to transmit over 1,880 hours of annual programming to the satellite uplink, and producing the monthly broadcast schedule for use by federal courts across the country. Our video staff also designs, films, and edits educational videos that are used in some FJTN broadcasts, in our judicial orientation programs, and by courts around the country in local education programs. We have a growing backlog of needs. Many of the educational videos we use need to be replaced—some are over ten years old.

The other five positions will let us expand the online computer conferences we provide the courts, place more interactive training and reference tools on our Web site, convert onto the Web our training tutorials now on CD-ROM and computer disc, and develop online inventory, ordering, and distribution services for Center educational publications and videocassettes. We also want to use our Web site to facilitate collaborative research, such as a site we have been asked to set up to facilitate collaboration by expert witnesses in analyzing proposed rule changes to accommodate electronic discovery. Additional technological personnel will not only help increase service to the courts over our Web site on the judicial branch intranet, but will increase service to the public over our Internet site by making our research products and appropriate educational programs available to wider audiences.

Center Services and Activities

We use a variety of methods and technologies to deliver education and information to the judicial branch. These include, in addition to the e-learning methods described above, in-person seminars and both electronic and print publications. Our curriculum packages, as well as our publications and satellite broadcasts, enable the courts to tailor educational programs developed at the national level to meet local needs.

Fair and efficient disposition of litigation

Center education programs stress the judge's responsibility to dispose of cases fairly, quickly, and inexpensively. This is the major theme of the initial orientation seminars for newly appointed judges, although the videos we use in these programs are increasingly dated.

We also stress case management in our continuing education seminars, which provide vehicles for judges from different courts to compare effective techniques and procedures. We also use distance learning tools when they can be effective. For example, we have in place contingency plans to use the FJTN and our cycle of continuing education seminars to explain to bankruptcy judges and clerks new responsibilities created by the bankruptcy legislation now under consideration.

Other Center products provide judges with ready sources of advice on particular aspects of case management and legal trends. Examples include the following manuals and desk references:

- *Manual on Recurring Problems in Criminal Trials* (4th ed., in revision);
- *Benchbook for U.S. District Court Judges* (4th ed., rev. 2000);
- *Manual for Litigation Management and Cost and Delay Reduction* (1992)—the basis for the revised manual approved this year by the Judicial Conference in compliance with the Civil Litigation Reform Act;
- *Manual for Complex Litigation, Fourth* (in production);
- *Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations* (2000) and a forthcoming guide—both deal with alternative approaches to the management of complex mass tort litigation;
- *The Use of Visiting Judges in the Federal District Courts: A Guide for Judges & Court Personnel* (2001)—to assist the process of providing courts temporary assistance in managing their dockets; and
- *Case Management Procedures in the Federal Courts of Appeals* (2000)—to describe procedures and practices that courts of appeals have used effectively.

FJTN broadcasts include the following:

- "New Amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence" (in cooperation with the American Law Institute-American Bar Association);
- "The Supreme Court Term in Review"—an annual broadcast to inform judges and their law clerks of decisions that will affect the litigation before them;
- "Bankruptcy Law Updates" (released periodically); and
- numerous broadcasts for clerks' office staff.

The Center this year has begun a multiyear research project to update the case weights used by the Judicial Conference for determining judgeship needs.

Alternative methods of resolving disputes

The Alternative Dispute Resolution Act of 1998 directed district courts to offer litigants alternatives to traditional litigation. Center activities to implement the statute include:

- an FJTN broadcast soon after passage to inform the courts of the statute's requirements, and a national seminar for ADR administrators from all districts with specific instructions on how administrators can meet their responsibilities under the Act;
- recurring seminars to teach mediation skills to magistrate judges and appellate conference attorneys; and
- *Judicial Guide to Managing Cases in ADR* (2001, in production) and previous publications on federal court ADR, to advise the courts on how to implement sound ADR programs and use them effectively.

Sentencing, offender supervision, and prisoner litigation

Federal sentencing and offender supervision policies are shaped by statutes, the sentencing guidelines, and case law. Center activities in these areas include:

- periodic sentencing policy institutes, in cooperation with the Judicial Conference Committee on Criminal Law, the Sentencing Commission, and the Bureau of Prisons;
- FJTN programs, including "Charging and Sentencing after *Apprendi*," about the case law applying the Supreme Court's decision last June on permissible sentence enhancements; our "Special Needs Offender" series (monographs and FJTN broadcasts about offenders whose supervision presents special problems, including gang members, cyber-criminals, and white-collar criminals); "Recurring Issues in Federal Death Penalty Cases," for judges assigned capital cases; and a series of programs on application of the guidelines, produced in cooperation with the Sentencing Commission;
- print and electronic publications, including *Resource Guide on Federal Capital Cases* (2001), an online resource based on experiences of judges in cases in which the Justice Department sought the death penalty; *Guideline Sentencing Update*, summarizing re-

cent decisions interpreting the legislation and guidelines; and *Financial Investigation Desk Reference for Probation and Pretrial Services Officers* (Dec. 2000 ed.); and

- "Risk Prediction Index," a statistical instrument to help probation officers predict an offender's risk of recidivism; the Center has recently adapted it for pretrial uses.

We are presently unable to meet the need for biannual video and Web-based scenarios to sharpen probation and pretrial services officers' responses to defendant and offender incidents; safety skills should be routinely honed so reactions are automatic. With additional media staff we could develop federal court specific foreign language video and audiotapes for officers and front-office staff.

Prisoner litigation challenging sentences and conditions of confinement also make up substantial portions of some dockets and are treated in Center seminars on §1983 litigation.

Science and statistics in the courtroom

The Chief Justice said in January, "Federal judges today face cases involving complicated statutes and factual assertions, many of which straddle the intersections of law, technology, and the physical, biological, and social sciences. FJC education programs and reference guides help judges sort out relevant facts and applicable law from the panoply of information with which the adversary system bombards them. The FJC thus contributes to the independent decision making that is the judge's fundamental duty."

Center products to help federal judges exercise the responsibility assigned them by the Supreme Court in assessing the suitability of scientific and technical evidence include the following:

- *Reference Manual on Scientific Evidence* (2d ed. 2000), which has been widely reprinted by private publishers;
- "Science in the Courtroom," a six-part FJTN series on such topics as microbiology, DNA, and toxicology, analyzed in the context of evidentiary hearings; and
- Center educational seminars for small groups of judges on basic issues of science in litigation, the impact of new technologies on intellectual property law, environmental law, and law and the Internet.

A prime reason for which we seek to increase our automation staff is to provide judges with online, interactive instructional tools to help deal with complex evidence.

Responsibilities under the codes of conduct

Judges and court employees operate under a mix of statutory and administrative rules to avoid conflicts of interest or their appearance. The Center has stepped up its education in this area to help ensure that all judges and employees understand these rules.

- Judicial ethics is a major topic at the Center's initial orientation seminars. Only this year will we be able to replace the instructional videos we have been using since 1991. Judicial ethics has also been the subject of at least one session at each of our general continuing judicial education programs for the last three years.
- A curriculum program for in-court programs, now used by over 7,000 employees, that explains the code of conduct for federal court employees.
- A one-hour segment of the Center's annual FJTN orientation for new judicial law clerks uses a series of hypothetical cases to alert clerks to their ethical obligations. Those hypotheticals were produced in 1998 and will soon need updating.

Court management

Effective use of public resources is a challenge in all three branches of government. The Center uses various means to help judges (especially chief judges) and court managers apply sound management principles and provide effective leadership. They include:

- *Deskbook for Chief Judges of U.S. District Courts* (2d ed., in revision), which explains chief judges' formal and informal obligations and lessons from private sector management experience. Additional automation staff would help us place the new edition online with links to relevant sources.
- We hope also to produce a video for new chief judges in which experienced chief judges describe the challenges new ones are likely to face.

Teaching management skills requires some personal interaction. The Center provides:

- conferences for chief judges (annual for district chiefs, and biennial for bankruptcy chiefs);
- seminars to help teams of chief judges and managers devise strategies and implement strategic plans for effective operations;
- biennial conferences for senior court managers;

- multiyear leadership development programs to develop mid-level managers' leadership skills for current and senior management positions; and
- management education modules for local training on such topics as performance management and employee relations.

Implementing technological change

Projects to help manage the impact of technology on the judicial process include:

- *Effective Use of Courtroom Technology: A Judges Guide to Pretrial and Trial* (spring 2001, print and CD-ROM)—developed with the nonpartisan National Institute of Trial Advocacy, it provides guidance on the procedural, evidentiary, and substantive issues that arise when a court is equipped with evidence display, videoconferencing, and other technologies, or when lawyers bring that equipment to the courtroom for a particular case. It describes what the lawyers hope to accomplish with the technology and analyzes the evidentiary objections opponents are likely to raise and the considerations of fairness that attend the various uses of technology.
- Electronic case-filing tutorials for the bar—the Center has developed two prototype computer-based training courses for use in district and bankruptcy courts that permit lawyers to file cases electronically. Courts that are now using electronic filing have adapted our tutorial as the teaching tool for showing lawyers how to use the electronic filing system in their courts.
- The cost of pretrial discovery is increasingly affected by discoverable materials being stored in electronic formats, including outmoded formats. The Center, anticipating the growing impact of this problem on civil case management, began studying it several years ago and now responds to bench and bar groups' requests for advice on electronic discovery management, cost reduction, and the appropriate use of computer experts; sample discovery orders and protocols; and plain-English explanations of the relevant technology.

Globalization of commerce and crime; rule of law assistance to emerging democracies

About a third of federal judges at least occasionally face problems in transnational litigation, such as service of process, discovery in foreign coun-

tries, and disputes over choice of law or jurisdiction. This type of litigation will increase. Services to help judges include:

- a monograph to be published this year on international insolvency, and
- development of additional monographs on international law and transnational legal topics, in cooperation with the American Society for International Law.

Globalization has also led foreign judges and officials to turn to the United States to learn about the effective administration of justice. The Center, pursuant to a statutory mandate, provides assistance to foreign visitors through briefings at its Washington offices (last year for over 300 judges and officials from 40 countries). Center staff also provide occasional technical assistance when consistent with our primary domestic obligations. For example:

- in cooperation with Puerto Rico's Interamerican Center for the Administration of Justice, assisting Latin American judges, prosecutors, and defenders to understand common-law criminal procedures, which hemispheric countries are implementing to increase accountability and reduce corruption;
- assisting India, Namibia, and Zambia to implement case-management programs and alternatives to traditional procedures in order to improve the resolution of legal disputes; and
- assisting the Russian Academy of Justice to develop as a counterpart institution to the Federal Judicial Center.

Center education for federal court personnel on transnational issues uses its appropriated funds. Its assistance to foreign judiciaries, however, is funded by other government agencies and private organizations.

* * *

Mr. Chairman, I appreciate this opportunity to describe the Center's work and explain our budgetary needs for the next fiscal year. We are proud of our ability to adapt technology to education and avoid, for the last five years, requests for increased funds for travel. In candor, I must tell you that we have probably reached the limits of our ability to meet the growing needs of the courts without some additional support for traditional educational methods. This year, however, we again seek only to enhance our technological personnel.

I will be pleased to answer any questions you may have.

STATEMENT OF GREGORY W. CARMAN
Chief Judge
UNITED STATES COURT OF INTERNATIONAL TRADE
before
The Subcommittee of the
Committee on Appropriations
House of Representatives

March 21, 2001

Mr. Chairman, Members of the Committee:

Thank you for allowing me this opportunity to submit this statement on behalf of the United States Court of International Trade, which is a national trial-level federal court established under Article III of the Constitution with exclusive nationwide jurisdiction over civil actions pertaining to matters arising out of the administration and enforcement of the customs and international trade laws of the United States.

The Court's budget request for fiscal year 2002 is $13,112,000, which is $637,000 or approximately 5.1 percent more than the available appropriation of $12,475,000 for fiscal year 2001. The request will enable the Court to maintain current services and provide funds for an architectural analysis of the Court's interior and exterior environment. I would like to specifically point out that almost 88 percent of the Court's overall requested increase is comprised of pay and other standard inflationary adjustments to base.

The United States Court of International Trade Courthouse was built over 35 years ago and is in need of repair and upgrades. To this end, the Court is requesting, for the first time since fiscal

year 1989, a program increase of $75,000 for an architectural study of the Courthouse that will address the shortcomings of the building in the areas of security, health and overall operations of the Court and recommend a course of corrective action, if necessary.

The Court's fiscal year 2002 request includes funds for maintaining, supporting and continuing the implementation of its new Case Management and Electronic Case Files System (CM/ECF) and the related file tracking and scanning and indexing solutions. Additionally, there are funds for maintaining and supporting several ongoing projects, specifically: (1) a networked records management and tracking system for all case records; (2) an online library automation system that enables the Judges and Court staff to search electronically for books and materials in the Court's Library collection; (3) the replacement of the Court's obsolete phone system with one that enables the Court to address its current and future telecommunication needs; and (4) the replacement of certain furniture with new ergonomic designs that will help to minimize the risk of injury to Court personnel. The Court's fiscal year 2002 request also will support the Court's continuing effort in education and training for the Judges and Court staff that will enable the Court to better fulfill its mission. Lastly, the fiscal year 2002 request also includes funds for the support and maintenance of security system upgrades implemented by the Court in fiscal years 1999 through 2001.

During fiscal year 2000, the Court, in accordance with its five-year plan adopted in 1996, continued to design and implement projects that support the Court's future needs and utilize technology to enhance services to the Court family, the bar and the public. Several projects in support of that plan are expected to be implemented and continued in fiscal year 2002: (1) the replacement of older category 3 wire with enhanced category 5 wire and the installation of additional data tap runs for public access terminals; (2) the planning, design and development of an Intranet that

will enhance the sharing of information among the Judges and staff and expand in-house training by utilizing automation and technology; (3) the establishment of an interactive training environment including new equipment and an additional satellite downlink that will enable Judges and staff to view and participate in training programs broadcast through the Federal Judicial Training Network; and (4) the installation of a raised platform floor in the Court's data center that will enable the Court to adequately wire the center for data and electrical connections, thereby providing greater flexibility and improved connectivity. The Court anticipates that these projects will be completed and operational by the end of fiscal year 2004. The continuation of fiscal year 2001 projects and the implementation of new initiatives will enable the Court to continue to build and update its infrastructure and operate more efficiently and effectively.

I would like to reaffirm that the Court always has been modest in its appropriation requests and will continue, as it has in the past, to conserve its financial resources through sound and prudent personnel and fiscal management practices.

The Court's "General Statement and Information" and "Justification of Changes," which provide more detailed descriptions of each line item adjustment, were submitted previously. If the Committee requires any additional information, we will be pleased to submit it.

STATEMENT OF HALDANE ROBERT MAYER
CHIEF JUDGE, U. S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
BEFORE THE SUBCOMMITTEE ON THE DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY AND RELATED AGENCIES
OF THE COMMITTEE ON APPROPRIATIONS
OF THE HOUSE OF REPRESENTATIVES

March 21, 2001

Mr. Chairman, I am pleased to submit my statement to the Committee for this court's fiscal year 2002 budget request.

Our 2002 budget request totals $20,446,000. This is an increase of $2,492,000 over the 2001 approved appropriation of $17,954,000. Thirty-four (34) percent of the requested increase, $843,000, is for mandatory, uncontrollable increases in costs. The remaining increase of $1,649,000 is for funding of additional positions and renovation of our courtrooms.

Request for Program Increases:

$1,649,000 of our fiscal year 2002 request will cover in part the costs of four (4) statutorily authorized positions for technical assistants for the court's legal staff and one (1) additional position for the court's staff. The remainder of the requested increase is for courtroom renovations and installation of technology in one courtroom.

Funding for Four (4) Technical Assistants ($456,000). The court is requesting four (4) technical assistants in addition to the eight now approved for the court. Under the provisions of 28 U.S.C. § 715(d) the court may appoint technical assistants equal to the number of judges in regular active service. The four technical assistants requested here, plus those currently on board, will give the court one technical assistant for each of the twelve active judge positions.

The technical assistants do research and assist the court and all its judges in addressing technical aspects of appeals, maintaining consistency in precedential opinions, and otherwise fulfilling the court's mission. Technical assistants not only must

have a law degree but also must have a background in science or engineering because of the significant number of highly technical intellectual property appeals handled by the court. This court has exclusive jurisdiction over patent appeals from 94 district courts and the Patent and Trademark Office. These appeals often are difficult and time consuming, and involve complex issues at the forefront of biotechnology, computer engineering, pharmacology, and other areas of science and engineering.

The need to hire four technical assistants is critical to the efficient and effective operation of the court. Intellectual property litigation is a rapidly expanding area of the law. This is evident from the growing number of intellectual property cases filed with the court; the increasing complexity of patent issues submitted in each case; and the size of appendices accompanying each filing. Patent cases make up thirty-three (33) percent of the court's docket.

Funding for One (1) Position on the Permanent Court Staff ($78,000). The court requests funding to hire a full-time permanent position entitled Information Technology Specialist. Upon completion of a formal security review and assessment of the court's electronic information system, the National Security Agency (NSA) concluded that the court should hire an Information Technology Specialist. This person would monitor and protect the security of the court's information system. The Information Technology Specialist would insure that all electronic communications and information in judges' chambers and staff offices are protected and secure from compromise or unlawful release.

Technology in the Courtroom ($215,000). At the March 1999 session of the Judicial Conference of the United States, the Judicial Conference recognized that

courtroom technologies are a necessary and integral part of courtrooms. Based on the Judicial Conference's findings and the fact that the Administrative Office of the U. S. Courts (AO) currently is implementing this program in courts across the country, the court is requesting funding to upgrade the courtroom technology in one of our courtrooms. The figure of $215,000 was provided to the court by the AO based on its experience to date with upgrading courtrooms.

Funding for Courtroom Renovations ($900,000). The court is requesting $900,000 for use to begin modernizing and updating the Federal Circuit courtrooms. The National Courts Building opened in 1967. With the exception of replacement carpet, there have been no renovations or upgrades performed in the courtrooms.

The funding will be used to renovate the courtrooms, upgrade the security of the Judges' benches, purchase furniture, improve counsel rooms, modernize the lighting, and upgrade the sound system. The courtrooms need to be rewired for computer use, recording equipment, and improved technology. This is a one-time cost and would be reflected as a nonrecurring expense in our 2003 budget request.

It was recommended that the court request this funding from GSA. We have done so with no success. We are once again in the process of discussing the possibility of funding by GSA. Should we be successful in obtaining funding from that agency we would notify Congress and cancel this request.

I would be pleased, Mr. Chairman, to answer any questions the Committee may have or to meet with Committee members or staff about our budget requests.

Mr. WOLF. Thank you.

Judge HEYBURN. Congressman, I just want to make a few bullet point comments, if you will, about our requests and about some of the commitments that we think are important and a couple of our needs, which we want to highlight.

First of all, I want to thank the Committee for the appropriation for 2001. We were facing a very difficult situation, particularly along the southwest border, and this Committee and the Congress as a whole responded with the resources that we needed to do the job, and for that I want to thank you.

For the most part, the request this year is really a continuation request, a status quo request, except for a few outstanding examples.

But 75 or 80 percent of our request is really inflation in terms of people, buildings, work load, expenses that we really cannot control, as is so much of our budget. And that is what we are asking for.

Whether it is the need of new probation officers to supervise the thousands of new persons who are on supervised release, or whether it is new federal defenders to represent the thousands of new indigent defendants that are being indicted each year, those are the kind of things we are talking about.

Another thing I want to highlight is our commitment to spending the funds which you give us, spending those funds wisely. We spend a lot of time and effort to make sure that the money we receive is spent wisely, that the money we ask for is needed.

We have developed staffing formulas over the years that help us determine where the resources go. As a matter of fact, I am sure you noticed that although we are requesting about 220 new judicial employees—this is over the entire judiciary in this budget only 220—260 of those are probation and pretrial officers. We are actually reducing the number of employees in bankruptcy courts and courts of appeal.

So our formulas that we use do not always just increase the number, they also decrease the number when the work load or other factors require it.

Three main issues that we think are on the table which I believe should be of interest to you, some of which you have some direct control over, and others just indirectly affect the work judiciary and your appropriation.

First of all, we are asking for, and this is a significant increase although in dollar amounts, it is not a large amount, about $35 million, but we believe that the panel attorney rates for defenders needs to be increased.

Fifteen years ago, in 1986, the Congress authorized the $75 in court and out of court for panel attorneys. These are private attorneys who defend indigent defendants.

And at the same time, Congress authorized a yearly cost of living increase for those attorneys. The problem is that since that time, Congress has never funded those COLAs and, as a matter of fact, has not funded even sufficient funds to allow every district to pay those panel attorneys $75 an hour.

A lot has changed in 15 years. For one thing that has changed is that many, many more of the people who are indicted are indi-

gent and requiring some sort of federal defense, whether it is a federal defender, someone who is on the actual payroll, or a panel attorney.

We are always going to need panel attorneys because in a multi-defendant case, a federal defender cannot defend everybody. There would be a conflict of interest.

And we are getting to a situation and it really, it is a fascinating dynamic, and it varies from state to state. But we are getting to a situation where the $75 an hour is just not sufficient in many, many areas to get the kind of competent counsel that we need to represent these defendants.

And the results of less than adequate counsel can be felt throughout the system. Cases that take longer, mistakes during trial that have to be dealt with by courts of appeals, all kinds of problems. And we think that this, a dramatic step can be taken by increasing the amount which we can pay these panel attorneys.

Now we are asking for $113 an hour. That is not even close to what these people get in, you know, the private sector. But we think it is enough, and our judgment is in the 113 is just the extrapolation of the cost of living from 1986 to the present.

We think that is enough to get the kind of quality representation that we think a justice system that is the best in the world deserves to provide.

And again the cost of it this year is $35 million on an annualized basis. It is probably $60 million, something like that, which is a significant amount in the defender budget, I must admit. In the overall budget, of course it is not a large amount.

Number two. Catch up COLA for judges. We are asking for 9.6 percent. There has been a lot of discussion about this and the chief justice has been in the forefront of explaining that if we are going to maintain over the years the quality, the high quality of the judiciary that we now have, we need to have not just the prestige of the job, but also a salary that is commensurate to it.

I know there are lots of issued involved, obviously the linkage between congressional and judicial pay, but as you know, Chairman Wolf, there is also a linkage with the Senior Executive Service and how we are in the process of creating a very difficult situation in attracting the kind of quality people we need in the Executive Branch, and perhaps your own staffs, because judicial salaries, congressional salaries effectively put a lid on what we can pay these highly qualified people.

Finally, the issue of judges. I know that usually and traditionally, this Committee is not responsible for authorizing judges. Somehow, one way or another, over the last couple of years, it seems to have been through the repository for that kind of action.

And I wanted to mention it because the need for additional judges is significant. Of course it affects, to a small degree, the appropriation that we ultimately would receive, but particularly with regard to the Southwest Border, though you were terrific last year in giving us all the resources we could possibly ask for for the Southwest Border, except for one resource, and that is a resource that you could not control and which really creates a bottleneck, and that is all the probation officers in the world will not help the

fact that there are just not enough judicial resources along the Southwest Border.

In California, Southern California, that district, there are I believe there are eight vacancies in Southern California. There are overall in Southwest along the Southwest Border States, there have been requests for authorization of, last year, of 22 new judgeships. Only four were authorized, so we have 18 unauthorized judgeships that our formula show we need along the Southwest Border, and we will show this video in a second.

And I think you will see why the judgeships are so important.

And then eight unfilled positions in California. So it creates a crisis situation that no amount of money that you could appropriate could really solve.

And another part of the whole puzzle, it is unusual for one branch of government to come in and ask for additional resources for another branch.

But that is exactly what we have done with regard to the Marshal Service and the Bureau of Prisons, because again you could appoint the new judges.

But if there are not enough marshals to make sure the whole situation is safe, if there are not enough facilities to house 1.6 million folks were arrested along the border; only a small portion of those of course were dealt with by the federal system, but it is a logistical and administrative nightmare there, and we are trying to do our part.

But we can not do it without the resources and also without the help of others.

So that is really the three or four main things that I wanted to tell you. I hope in the course of our testimony, you know, we do not want—sometimes these budget hearings get down to talking about a million dollars here and a million dollars here, and budget gimmicks, and auditing techniques, but I hope you will come to learn the real face of the Judiciary, which is so important; how all the judges out there are working so hard to enforce the laws; the probation officers who use all their expertise to try to help people not go back to prison, to get off drugs, to make a better life not just for themselves but for their families.

You know, the worst thing is a Federal Judge that I think we have to do is to sentence someone to prison who has a family. You know if someone makes an individual mistake and they know it is a mistake, they have to pay for it themselves. But when you have to send someone to prison because you have no alternative and you know how it is going to affect a family, it is just a terrible feeling.

You hope, sometimes you wish there was an alternative. We have these probation officers and others who work with these folks to try to help them resurrect their life and we are asking for the resources to help them continue to do their job.

I look forward to working with you. Our philosophy is also one of bipartisanship. We know we have to deal with everybody. We have had a very good relationship with Mr. Serrano. I view it as my job to answer your questions directly and to the point and give you the information that you need to make the decisions that you have to make.

I did want to say, you asked a question at the outset about how we deal with OMB. By the statutes which Congress has passed—and this makes sense when you think about it—we are required to submit our budget request to the Office of Management and Budget for inclusion in the Executive budget.

The statute which Congress passed says that OMB must pass along our budget request without change—which makes sense. We are an independent Branch. We are not the Agriculture Department.

In fact, we do not have an opportunity to go in with the Director of Management and Budget and discuss our budget request.

We are not part of the Executive Branch. We are an independent Branch. So they do not analyze our budget and then pass along their judgment to you.

Of course if they did have a judgment about it, I assume they are perfectly free to come here and give you their opinion. But our belief is that as an independent Branch, and according to the statute, they are required to pass along our budget unchanged.

Now occasionally over the past few years we have had some, I would say, pretty vociferous disagreements with OMB because they have used some what we believe to be perhaps unlawful budgetary gimmicks imposing what they call a negative allowance, sort of an asterisk in the budget, which suggests that our requests, or perhaps the Legislative requests, should be reduced somehow.

But they do that as an arbitrary matter without analyzing it the way they do the Justice Department request, or the Agriculture or Commerce request.

So that is our relationship with OMB. I would be glad to explain it further if you would like.

But having said all that, we do have a video which explains some of what——

[The written statement of Judge Heyburn follows:]

STATEMENT OF HONORABLE JOHN G. HEYBURN II
CHAIRMAN, COMMITTEE ON THE BUDGET
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON COMMERCE, JUSTICE, STATE
THE JUDICIARY, AND RELATED AGENCIES
OF THE COMMITTEE ON APPROPRIATIONS
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 21, 2001

INTRODUCTION

Chairman Wolf and Members of the Subcommittee, thank you for giving me the opportunity to testify on the judiciary's fiscal year 2002 budget request. Chairman Wolf, it was a pleasure to meet with you last month and I look forward to working with you, the other members of the committee, and your dedicated staff as we go through this process.

With me today are Judge Lawrence L. Piersol, Chief Judge of the United States District Court for the District of South Dakota, who is also a member of the Budget Committee; Leonidas Ralph Mecham, Director of the Administrative Office of the United States Courts, who is also Secretary to the Judicial Conference and a member of its Executive Committee; and Judge Fern Smith, Director of the Federal Judicial Center.

Before addressing our fiscal year 2002 request, on behalf of the entire judiciary, and especially our very busy courts along the southwest border, I would like to express our sincere appreciation for the generous funding levels this subcommittee and the Congress provided to the judiciary for fiscal year 2001. As you know, the courts were facing a severe crisis along the southwest border and the fiscal year 2001 appropriations

provided the funds needed to hire staff to address the workload explosion that occurred there over the past few years. It is the first time since 1998 that we have been able to fund the courts' staffing needs. For that we are thankful. The increase this subcommittee provided in fiscal year 2001 will demonstratively improve justice across the country. I would be remiss if I did not state at this point that while the additional staff resources provided by Congress will make a huge difference, many courts, especially those along the southwest border, are woefully short of judges. I will discuss this issue in more detail later in my statement.

BUDGET OVERVIEW

Overall, the judiciary has submitted a fiscal year 2002 budget request that is necessary to maintain our current level of staff and operations and to allow the courts to handle growing workload and other critical needs. In total, we are requesting a $610 million increase in appropriations for all judiciary accounts over the fiscal year 2001 enacted level. More than three-quarters of this increase ($464 million) funds base adjustments needed to continue current operations. The remainder ($146 million) is primarily to rectify the critical deficiencies in the Supreme Court Building that I believe you will be discussing with the justices next week ($110 million), and to continue the efforts begun last year to provide the courts the staffing resources needed to keep pace with workload increases. A detailed explanation of our fiscal year 2002 request is included as an Appendix.

ENSURING THE QUALITY OF JUSTICE

An independent judiciary that all of our citizens trust and respect is a fundamental tenet of our nation. In order to foster that independence, citizens must believe that their disputes will be resolved in a fair and expeditious manner. To do so requires a commitment by the Congress to provide the courts adequate resources. Our request before you today provides a blueprint of those resource requirements.

Of course, we in the Judicial Branch must also make a commitment, to do everything in our power to utilize the resources provided by Congress effectively and efficiently. Later in my statement I will discuss our ongoing efforts to contain costs in the judiciary, but first I would like to take you behind the scenes and provide examples of the dedicated work performed throughout our judicial system.

Probation officers who supervise convicted felons as part of their sentence are a key component of the judicial system. Our probation officers work very closely with those they supervise, not only to ensure those individuals do not slip back into a life of crime, but also to assist them in changing their lives for the better. For example,

> Val, a single mom who was deeply involved in the drug culture, was imprisoned for distribution of cocaine. Once released from prison, Val was placed under the supervision of one of our probation officers. With the encouragement and support of her probation officer, Val worked steadily and supported her child, and at the same time, earned an undergraduate degree. She then went on to obtain a law degree, was subsequently admitted to the state bar, clerked for a state court judge, and was eventually admitted to practice in federal court.

The federal judiciary also brings about fairness and justice to the common citizen who is wronged and has only the court as its last resort for protection.

> A probation officer's rigorous enforcement of the conditions of supervision compelled one offender, a businessman who had embezzled from his employees' pension funds, to return his ill-gotten gains back to his victims. The offender steadfastly protested that he did not have money to pay the court-ordered restitution. However, the probation officer's scrutiny of the offender's affluent lifestyle and his questionable commingling of business and personal finances revealed otherwise. As a result of the officer's efforts, the offender paid $40,000, the balance of restitution owed.

Respect for our system of justice inspires the citizens who serve as jurors to go beyond the call of duty, as evidenced in a recent civil case that jurors considered for three days before reaching a verdict. It was later discovered that one of the jurors was functionally illiterate. The others took the time to read every exhibit to him.

Finally, this country's independent judiciary serves as a model worldwide to bring fairness and human rights to other nations. A visit by Russian Judge Sergei Pashin to a United States District Court helped inspire his desire to change Russia's courts into something more than a rubber stamp for prosecutors. Judge Pashin found in America a system of justice that was "...interested only in finding the truth."

Our ability to provide a level of service our citizens deserve is dependent in large part on the resources provided by Congress. The balance of my statement describes those resource needs in the following areas -- (1) an appropriate level of compensation for private panel attorneys; (2) a level of judicial officers and support staff commensurate

with the workload placed upon them; (3) an adequate level of security in the courthouses; and (4) adequate compensation for our judicial officers.

DEFENDER SERVICES

There are two areas where significant increases in resources are required in the defender services area to avoid adversely effecting the quality of our justice system. An increase of $23 million is needed to provide counsel for 5,200 additional representations projected for fiscal year 2002. This requirement is in large part a function of the projected increase in criminal filings by the Department of Justice. The other significant increase requested in this account is to provide $35 million to raise the compensation for private panel attorneys.

The increase of $35 million to raise the compensation for private panel attorneys is of the utmost importance to the federal judiciary. One of the biggest impediments to maintaining a fair system of justice is the low rate of pay that private panel attorneys receive. In 1986, Congress amended the Criminal Justice Act (CJA) to allow the judiciary to pay $75 per hour for both in-court and out-of-court work. At that time, the hourly rates were $60 for in-court and $40 for out-of-court. This amendment also allowed the judiciary to raise the $75 rate in future years to reflect inflation. Instead of keeping pace with inflation, Congress has only funded an hourly rate of $75 in-court and $55 out-of-court in most locations. In 1986 dollars, this $75/$55 rate is equivalent to only $46 in-court and $33 out-of-court, significantly less than the $60 and $40 rates that were

effective in 1986.

The $113 rate that is being requested for fiscal year 2002 is the amount that was envisioned by the amendment to the CJA in 1986, adjusted for inflation as the statute provides. The failure to implement higher panel attorney rates is increasingly becoming a problem in the federal criminal justice system. In some districts, judges are unable to find qualified attorneys to take many CJA appointments because the current rate often does not cover overhead costs. For example,

> A panel attorney with over 20 years of criminal law experience indicated that he is unable to provide his employees with health care or retirement benefits due to the low rates of pay. He added that rents in downtown Seattle have skyrocketed in recent years, from $12 per square foot in 1988 in his building to approximately $36 today.

The quality of justice will suffer further and citizens will begin to question the fairness of our judicial system when unqualified lawyers who don't have expertise in federal criminal practice are appointed to represent those defendants who are financially unable to retain counsel.

COURT SUPPORT STAFF

The judiciary is requesting $16 million for 212 new court support FTE to allow the courts to keep pace with changes in its largely uncontrollable workload. Court staff are the backbone of court operations and as caseload grows, staff must grow along with it. Without sufficient staff, processes are short- changed, cases may be delayed, support

provided to judicial officers and the public will deteriorate, and public safety is compromised. This can lead to a lack of confidence in our judicial system among our citizenry.

Most of the requested increase is for the probation and pretrial services program. Probation and pretrial services offices play an integral role in our criminal justice system and ensure public safety in our communities. There are almost 129,000 offenders under the supervision of probation and pretrial services officers as compared to 125,000 prisoners currently in federal prisons. The daily cost of supervision in the community in fiscal year 1999 was $7.74 compared to $59.41 for the Bureau of Prisons. The extent to which the offices are adequately staffed directly affects how closely they can monitor the activities of dangerous convicted felons and prevent potential problems. For instance,

> An offender on supervised release receiving mental health counseling, was given a polygraph examination to gauge the danger he posed to the community. It revealed that he was stalking an eight-year-old girl. The child's family was notified, the offender received treatment to address the problem, and a potential sexual assault was averted.

Probation and pretrial services offices need sufficient resources to provide necessary mental health and substance abuse treatment for offenders. The fiscal year 2002 request includes a $5.2 million increase for this purpose. These types of treatment programs can put people on the road to success. For example,

> John served a term of imprisonment following conviction for conspiracy to distribute marijuana and cocaine. While incarcerated, he successfully completed a drug and alcohol treatment program. When released, John entered an aftercare

program (under contract with the Probation Office) and regularly attended Alcoholics Anonymous and Narcotics Anonymous meetings. Eventually, he got a part-time job as a rehabilitation technician at a local outpatient chemical dependency treatment center. While continuing his part-time employment at the treatment center, John completed both a bachelor's degree and a master's degree in counseling, and is currently a doctoral candidate in the field of counseling. His career goal is to remain in the field of addiction counseling.

COURT SECURITY

A key tool in ensuring the quality of justice is maintaining adequate security in our nation's courthouses. If our citizens feel safe in the courtroom, they will feel more confident about what happens in those buildings. Being thoroughly screened when entering courthouses and having court security officers visible throughout is an absolute necessity to protect all who enter our courthouses.

Unfortunately, our court security appropriation, which funds court security officers and security systems, is one for which Congress could not find sufficient resources to meet the needs in fiscal year 2001. The fiscal year 2002 request rectifies these deficiencies, particularly in the area of replacing inadequate and outdated equipment. In addition, it includes funds for both court security officers and equipment for new buildings that will be coming online in fiscal year 2002.

Another security concern, though not part of the judiciary's budget request, is the lack of resources available to the U.S. Marshals Service. The Marshals Service is responsible for the security of courthouses, judges, court proceedings, and the public who

come into our buildings. They are also responsible for the transportation and security of prisoners and fugitive apprehensions. They are experiencing severe personnel resource deficiencies, particularly along the southwest border, where they do not always have enough deputy U.S. Marshals to move prisoners safely from their holding cells, through public hallways in courthouses, or to monitor them in the courtrooms. The Marshals Service should be funded so they can perform all of their security related missions in a safe and professional manner.

JUDICIAL COMPENSATION

We live in a society where cost-of-living salary adjustments to maintain purchasing power--whether such adjustments are made pursuant to a collective bargaining agreement or a statute as in the case of Social Security-- are a fact of economic life. Yet, over the past eight years members, judges, and high level executive branch officials have received only three annual Employment Cost Index (ECI) adjustments. As a result, their purchasing power has declined by over 13 percent, which amounts to more than $16,000 per year. While we are very grateful that Congress approved an ECI adjustment for fiscal year 2001, it is noteworthy that even the 2.7 percent increase failed to keep pace with the change in the cost of living.

The corrosive effects of this salary erosion on judges were well documented in a recent report published by the American and Federal Bar Associations. That report discussed in detail the potential effects of denying judges annual ECI adjustments,

including its effect on judges' recruitment, retention, and productivity. The report was favorably received by the media. It also confirmed the views of the Chief Justice, who in his 2000 year-end statement observed that "in order to continue to provide the nation a capable and effective judicial system we must be able to attract and retain experienced men and women of quality and diversity to perform a demanding position in the public service . . . In order to continue to attract highly qualified and diverse federal judges -- judges whom we ask and expect to remain for life -- we must provide them adequate compensation."

For the aforementioned reasons, the Judicial Conference strongly encourages Congress to authorize an Employment Cost Index (ECI) adjustment for federal judges, members of Congress, and top officials in the executive branch for 2002 and subsequent years, as provided by law; enact legislation to give judges and other high level federal officials a "catch-up" pay adjustment of 9.6 percent to recapture previous ECI adjustments that were not provided; and authorize a Presidential commission to consider and make recommendations to the President on appropriate salaries for high-level officials in al three branches of the government.

NEW JUDGESHIPS

Without judges, justice cannot be administered. There has not been a major judgeship bill since 1990. Yet increases in federal jurisdiction and law enforcement resources over that period have contributed to a more than 25 percent increase in

workload for the judiciary. Only through the appropriations process has there been a modest increase in judgeships with nine added in the fiscal year 2000 and ten in the fiscal year 2001 appropriations bills. The Judicial Conference of the United States currently is requesting that 54 Article III judgeships be created. Despite Congress' efforts in the last two appropriations bills, there are some districts -- particularly those along the southwest border -- where the workload has more than doubled, but where the number of judgeships remains constant. Justice in these locations has been compromised because the judges have not been there to meet the workload demands.

COST CONTAINMENT

One area in which the judiciary takes great pride is its continual effort to work more efficiently and effectively while still maintaining the high quality of justice. The *Optimal Utilization of Judicial Resources Report* that we send to your subcommittee annually is a compilation of our initiatives. A bird's-eye view of a court illustrates the range of efforts we have underway.

In a federal courthouse, a bankruptcy clerk is able to use the Internet for transactions made by the Bankruptcy Noticing System. The Internet connection replaces the U.S. Mail method, saving postage expenses and allowing the transmission of notices at a fraction of the time. Postage costs were further reduced when fax options were introduced to the Bankruptcy Noticing Program in fiscal year 2000.

At the same time, a court executive might be checking e-mail for an important

memo from the Administrative Office. In fiscal year 2000 the Administrative Office began to send official policy directives, time-sensitive documents, and other important information to chief judges and court unit executives, electronically rather than using paper memos.

Meanwhile, in a district clerk's office, staff are calculating juror payments using the Jury Management System, an automated software system that also prints and scans qualification questionnaires and summonses, and tracks jurors, among other things. This system is expected to be implemented in most courts by the end of 2001. The system reduces errors caused by redundant data entry and gives the court immediate access to juror statistics.

A clerk of court's office also is receiving hundreds of case filings from attorneys -- with no one standing in line at the court. Instead, they may be miles away, in their own offices, making use of the Case Management/Electronic Case Files System to send and retrieve case documents over the Internet. In turn, a court uses the electronic records for efficient docketing, scheduling, and notice production. In addition, litigants are able to search, locate, retrieve, and deliver case documents electronically. A version of the system is installed already in 14 bankruptcy courts and seven district courts. The judiciary has completed testing of the bankruptcy version and is now beginning nationwide implementation.

Staff in a judge's chambers are going on-line to post a notice of an available law

clerk position on the Federal Law Clerk Information System. The judiciary developed this national database to save time and help judges and law students with the annual process of hiring law clerks. In the short time this system has been available, nearly one-third of all judges are using it and the number is growing.

In a busy courthouse, a courtroom equipped with a television monitor and a video camera can be used to hold a hearing, in which the parties are separated by several hundred miles. In the district courts, videoconferencing is being used in pretrial, civil, and certain criminal proceedings, prisoner matters, sentencing, settlement conferences, arraignments, and witness appeals. Videoconferencing saves travel time and reduces security risks in transporting prisoners. At the appellate level, oral arguments may be heard using videoconferencing, again saving time and the cost of travel. To date, more than 200 federal court sites have been equipped to received these broadcasts.

Television monitors may also be in use elsewhere in the courthouse, but in a very different role. Judicial employees at the court are participating in a classroom instruction on use of a word-processing program. Also on the agenda is a program for probation and pretrial services officers on the special needs of offenders. Programs transmitted over the distance learning network, the Federal Judicial Television Network, allow employees to receive instruction without traveling to training sessions. Millions of travel dollars are saved by the use of distance training.

CONTRIBUTIONS OF THE ADMINISTRATIVE OFFICE

The Administrative Office of the United States Courts is critical to the judiciary's ability to provide quality justice. The Director of the Administrative Office serves as the chief administrative officer for the federal courts. The Administrative Office provides essential administrative support, program management, and policy development assistance to federal courts nationwide. Administrative Office employees support 32,000 judiciary employees, including 2,000 Article III, bankruptcy, and magistrate judges, as well as probation and pretrial services officers, circuit executives, federal public defenders, clerks of court, court reporters and interpreters, financial administrators, jury administrators, systems managers and others.

Support of the Judicial Conference and its committees remains an essential function of the Administrative Office. The twenty-four committees have Administrative Office staff experts who work closely with them in conducting research and supporting their judiciary-wide policy and governance function. The Administrative Office also executes and implements Judicial Conference actions.

An important Administrative Office responsibility is supporting, coordinating, and implementing the judiciary's numerous efforts to reduce costs and manage resources most efficiently. The various cost-containment efforts I just summarized, as well as all of those listed in the *Optimal Utilization Report*, are only possible because of the efforts of the Administrative Office. Without the Administrative Office, many of the savings and cost

avoidance initiatives would not have materialized.

In the interest of continuous service improvement, the Administrative Office conducts or oversees, in connection with Judicial Conference Committees, a large number of strategic studies of judiciary programs and operations. An independent study of the national information technology program found that the judiciary is making effective use of technology. The study indicated that this is a significant accomplishment given that the judiciary's investment in information technology is well below federal government benchmarks and what would be expected given the complexity of the judiciary. The Administrative Office also oversaw a comprehensive management assessment of its space and facilities program. The Administrative Office is working with an outside contractor to conduct a strategic comprehensive assessment of the probation and pretrial services system. The broad issue is whether there are ways to accomplish the system mission more effectively when facing increasing responsibilities, changing federal criminal populations, and constrained budgets. There is also a study being conducted of the judiciary's security program to evaluate its effectiveness and efficiency.

The fiscal year 2002 budget request for the Administrative Office is $4.8 million over fiscal year 2001 appropriations. Most of this increase would fund base adjustments needed to continue current operations. The remainder ($693 thousand) will be devoted to improving programmatic oversight and support of court programs such as the probation and pretrial services system as well as to developing major automated systems. In

addition, funds are requested for equipment maintenance and replacement and software upgrades to allow the core Administrative Office financial and automated systems to remain functional and current.

I urge the Committee to fund fully the Administrative Office's budget request. The Administrative Office is integral to the judiciary's ability to do its work. Without the Administrative Office's support, the judiciary could not continue to function as effectively. The increase in funding will ensure that the Administrative Office continues to provide program leadership and administrative support to the courts, and lead the efforts for them to operate efficiently.

CONTRIBUTIONS OF THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the federal judiciary's agency for continuing education and training. With this subcommittee's encouragement, it has worked hard in the last few years, with the resources available to it, to provide even more of its education through "distance learning" which does not require participants to travel to the training.

As Judge Smith's statement notes, educational programs sponsored by the Center or arranged locally using Center resources reached over 50,000 participants last year, and over 90% of those participating did so at their desks, before a TV monitor, or elsewhere in the courthouse.

Even educational technology, though, requires resources. Last year, the Center received a current services appropriation, but no more. This was the first current services

appropriation for the Center in ten years. This year the Board of the Center proposes a modest increase for normal adjustments to the base budget and for additional positions to enhance the effectiveness of its distance learning.

In evaluating the Center's request, I ask the subcommittee to consider not only how the Center uses technology for education but also the importance of the education itself to the fair and efficient operation of the judicial branch. Center orientation seminars, for example, introduce every judge to his or her responsibility for effective docket management. And, in respect to the growing amount of complex litigation involving scientific and technical evidence, as the Chief Justice said in his year-end statement, "FJC education programs and reference guides help judges sort out relevant facts and applicable law from the panoply of information with which the adversary system bombards them. The FJC thus contributes to the independent decision making that is the judge's fundamental duty."

For another example, Center education helps probation officers deal with the range of sophisticated offenders convicted of federal crimes. Judge Smith's statement summarizes these and many other ways in which Center education and Center research improve the administration of justice.

I believe the Center's request deserves the committee's support and urge favorable action on the full amount.

CONCLUSION

Chairman Wolf and members of the subcommittee, this concludes my statement. I look forward to working with you and I would be pleased to respond to any questions you may have.

Judge MECHAM. Chairman Wolf, could I just underline two things that the chairman, Judge Heyburn, said?

First with respect to OMB, we met with Mr. Daniels because they control our building budget. And we wanted to get a little support from them on buildings. And because the money for the buildings goes through the GSA. It was important for us therefore to meet with him, as we had met with his predecessors, to talk about buildings.

We do not have an opportunity to justify our budget, nor should we seek one, with OMB because GSA is responsible for that. But it does put us in a very awkward position.

By statute I am supposed to provide the physical needs for the Judiciary but I cannot do it without going through GSA. It is not a very good situation.

The second thing is with respect to the Southwest Border. Twenty-seven percent of the criminal cases in the United States now are handled by the five courts on the border with Mexico.

The conditions along there are truly deplorable, as Judge Heyburn said. With respect to San Diego, they have eight judges in the Southern District of California. They need eight more because of their tremendous workload.

Now through your good auspices here in this Committee we got some relief in Texas Western, Texas Southern, New Mexico, and Arizona—not enough, but some. There was no relief given in the Southern District of California. They need judgeships and they need them desperately.

[The written statements of Judge Mecham and Piersol follow:]

Honorable Lawrence L. Piersol
Chief Judge
United States District Court
District of South Dakota

Lawrence L. Piersol received a B.A. Degree in 1962 and a J.D. Degree in 1965 (summa cum laude) from the University of South Dakota. While in Law School he was Editor-in-Chief of the South Dakota Law Review. After graduation he spent three years as a Captain in the Judge Advocate General Corps of the United States Army trying general court martial cases. From 1968 to 1993, he was a trial lawyer with the law firm of Davenport, Evans, Hurwitz and Smith in Sioux Falls, South Dakota. In 1993 he was appointed as a United States District Court Judge. In 1999, Judge Piersol became Chief Judge for the District of South Dakota.

Member, Budget Committee of the Judicial Conference of the United States; Member, Eighth Circuit Judicial Council and the Eighth Circuit Judicial Council Committee on Gender Fairness Implementation Committee; Chairperson, Eighth Circuit Judicial Council Tribal Court Committee; Director and Vice President, Federal Judges Association; Advocate, American Board of Trail Advocates (Inactive); Master, American Inns of Court; American Bar Association.

Minority Whip, 1971-1972, Majority Leader, 1973-1974, South Dakota House of Representative.

LEONIDAS RALPH MECHAM

DIRECTOR
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
ONE COLUMBUS CIRCLE NE
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Leonidas Ralph Mecham was appointed Director of the Administrative Office of the United States Courts on July 15, 1985, by the Supreme Court of the United States. He earned his B.S. degree with "highest honors" at the University of Utah, his J.D. degree at George Washington University, and holds an M.P.A. from Harvard. He was awarded a congressional fellowship to Harvard in 1963 and a graduate fellowship by Harvard in 1965.

Mr. Mecham is a member of the Executive Committee of the Judicial Conference of the United States. He is also Secretary to the Judicial Conference of the United States and provides staff support to all Conference committees. He serves on the Board of Directors of the Federal Judicial Center. He is a member of the Judicial Fellows Commission; a member of the House of Delegates of the American Bar Association; and served for two years as a member of the National Advisory Council on the Public Service Act of 1990. In 1991, he was elected as a Fellow of the National Academy of Public Administration.

Prior to his appointment as Director of the Administrative Office, Mr. Mecham began his Washington career working in the United States Senate and became administrative assistant and counsel to a senator from Utah. After more than 13 years in Washington, he returned to Utah for four years serving as Vice President of the University of Utah and also served as Dean of Continuing Education Programs, and taught constitutional law. Among other duties, he founded the University of Utah Research Park.

Later, Mr. Mecham returned to Washington, D.C., where he was Special Assistant to the Secretary of Commerce for Regional Economic Coordination, and then Co-chairman of the Four Corners Regional Economic Development Commission, a Presidential appointment which required Senate confirmation. After his Commission work, Mr. Mecham became Vice President in charge of government relations for the Anaconda Company until it was acquired by the Atlantic Richfield Company. He then served as Washington representative for the Atlantic Richfield Company until he accepted the Administrative Office directorship.

Mr. Mecham is married to the former Barbara Folsom and has five children and fourteen grandchildren. He is a member of the Utah and District of Columbia Bar Associations. He served for 11 years on the University of Utah National Advisory Committee, most recently as Chairman, and is active in charitable and church service.

STATEMENT OF LEONIDAS RALPH MECHAM
DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS
BEFORE THE SUBCOMMITTEE ON THE DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY AND RELATED AGENCIES
OF THE COMMITTEE ON APPROPRIATIONS
OF THE HOUSE OF REPRESENTATIVES

March 21, 2001

INTRODUCTION

Chairman Wolf and Members of the Subcommittee, thank you for giving me the opportunity to testify before you on the fiscal year 2002 budget request for the Administrative Office of the United States Courts (AO). Chairman Wolf, it was a pleasure to meet with you and I look forward to working with you throughout the appropriations process. I am also pleased to continue to work with Mr. Serrano, the other Members of the Subcommittee, and your dedicated staff.

I would first like to express my appreciation to Representative Hal Rogers for his years of leadership as chairman of this subcommittee and his commitment to ensuring that the federal judiciary was provided with the resources necessary to keep up with the judiciary's burgeoning caseloads and expanding jurisdiction. We thank Chairman Rogers for his dedication to the administration of justice, look forward to continuing to work with him as a member of this subcommittee, and wish him well as chairman of the Transportation subcommittee.

I would also like to thank this subcommittee for its efforts in providing the AO with a funding increase for fiscal year 2001. Given the fiscal difficulties you faced during last year's appropriations process, especially as the bill was negotiated with the Senate and the Administration, I am very appreciative.

ROLE OF THE ADMINISTRATIVE OFFICE

The AO serves as the central support agency for the administration of the federal court system. The AO was created in 1939 in response to the separation of powers concerns that were raised by the Department of Justice being responsible for the judiciary's administrative needs. Over sixty years later, judicial independence and exemplary service to the courts continue to be the guiding principles that govern and influence AO operations.

The AO plays a key role in the administration of justice and management of change in the courts. It supports the Judicial Conference of the United States and its 24 committees in determining and implementing judiciary policies; develops new methods, systems, and programs for conducting the business of the federal courts efficiently and effectively; assists the courts in implementing better practices; develops and supports new innovative technologies that enhance the operations of the courts; collects and analyzes statistics on the business of the federal courts for planning and determining the judiciary's resource needs; provides financial

management services; provides personnel and payroll support for 32,000 judiciary employees; conducts audits; and has implemented a strong internal controls program designed to safeguard against fraud, waste, and abuse.

The work of all of the AO's employees supports the judges and court staff across the country and ensures that the judicial machine runs smoothly. In a period of resource constraints, and as the activity of the federal courts continues to grow in both size and complexity, the AO will continue to strive for administrative excellence through ingenuity, commitment, and innovation.

PROGRAM ASSESSMENTS

Another important leadership role the AO plays is in conducting management studies. These studies, performed with outside independent contractors, are aimed at improving court operations in major judiciary programs. (1) An assessment of the effectiveness and efficiency of the judiciary's space and facilities program was recently completed. The study recognizes that the judiciary has an effective long-range planning process which yields good projections for space planning needs. The study also offers several technical and process refinements to the long-range planning process. (2) A study of the judiciary's information technology program has also recently been completed. This study found that the judiciary is making effective use of information technology and that its investment in information

technology, both equipment and human resources, is significantly below federal government benchmarks given our complex information environment. The study also provided seven strategic recommendations designed to help the judiciary continue seeking and capitalizing on technology improvement opportunities. All the recommendations are already at some stage of being implemented. (3) Assessments of the court security and probation and pretrial services program are currently being conducted.

ADMINISTRATIVE OFFICE BUDGET REQUEST

The AO's appropriation request for fiscal year 2002 is $63,029,000, which is an increase of $4,817,000 or 8.3 percent above the available fiscal year 2001 AO appropriation. Eighty-five percent of the increase or $4,124,000 is necessary to fund uncontrollable adjustments to base for standard pay, benefit and inflationary increases. The remaining small increase of $693,000 will be used to improve the AO's programmatic oversight and support of court activities and improve the operations of core financial and automated systems.

Included in this request is funding for only four additional full-time equivalents. These additional AO staff will be devoted to providing technical support to probation and pretrial services and court administration programs with their 22,000 staff, and to developing major automated systems which support the

administrative functions discussed above. These staff will focus on conducting program and efficiency reviews; developing new case management programs and systems; and improving financial management and contracting procedures and regulations. These additional FTE will bring funded AO staffing levels back up to where they were in fiscal year 1996. While the AO could effectively use many more staff, the request is for a minimal increase.

Also included in the request is a $313,000 increase to fund necessary automation equipment and services. Due to funding constraints since fiscal year 2000, the AO has not been able to meet fully its requirements for equipment and services. This additional $313,000 will improve the operations of core AO financial and automation systems, including the Central Accounting System and the AO data communications network. Without these additional funds, we will not be able to restore reductions made in fiscal year 2000 to the basic level of automation service necessary at the AO, including user assistance, software, and infrastructure support for the entire judiciary. Given the dependence on personal computers and the data communications network to conduct AO business and provide essential support to the courts, it is crucial that funds be provided for replacement of essential equipment and software to keep the AO's inventory functional and up-to-date.

MODEL OF EFFICIENCY

This budget request demonstrates the AO's commitment to being a model of efficiency within the federal government. As an administrative support organization whose workload is largely driven by the size and workload of the courts it supports, the AO's growth over the past several years has not kept up with the growth experienced in the courts. Between fiscal years 1996 and 2002, the courts are projected to experience a 15 percent growth in funded staff, increasing the AO's workload substantially, while the AO's total staffing levels remain unchanged. Comparing the AO's budget to that of the Department of Justice's "Management and Administration" activities is further evidence of the AO's leanness. The appropriation for the AO is only 1.6 percent of the judiciary's total appropriation, while the Department of Justice's "Management and Administration" activities comprise 5.4 percent of the Department's total appropriation for fiscal year 2000.

ACCOMPLISHMENTS AND CHALLENGES FOR THE FUTURE

The federal judiciary accomplishes its constitutional mission with only two tenths of one percent of the federal government's budget, and the AO accomplishes its mission with less than two percent of the judiciary's appropriations. However, we recognize the fiscal constraints facing the Congress in the appropriations process and the necessity to use our small portion of the federal budget efficiently and

economically. In order to achieve this, the AO is tasked with developing new systems, programs, and policies that will allow the courts to continue to provide, and in many cases improve, the quality of services provided to the bench, bar and the public as workload continues to increase. This is a daunting task on which our dedicated staff works very hard every day. I would like to take a few minutes to describe some of our accomplishments, as well as some ongoing activities and challenges that face the federal judiciary and the AO in fiscal year 2002. Additional examples can be found in *The Optimal Utilization of Judicial Resources* report submitted to the subcommittee in February.

Management of Court Facilities

Due to the nature of its work, the judiciary is a space intensive organization whose mission requires that we be available to the entire population of the United States. The judiciary has operations in over 760 separate facilities across the country. These include accommodations for probation and pretrial services offices and court support functions as well as courthouses. Many buildings housing the judiciary are aging. The judiciary is currently housed in about 225 buildings that are over 50 years old. Even where the structures remain serviceable, the architecture of that time did not envision the security and technological needs of today.

The AO, along with the Judicial Conference and GSA, has aggressively

worked to develop policies to minimize the amount of space required and the costs associated with it. This task is very challenging given the judiciary's need for additional space to accommodate workload growth and the need to replace aging and outdated space. This work has resulted in the *U.S. Courts Design Guide* which is used to standardize new space acquired by the judiciary. The AO has also played an integral role in the development of a rigorous long-range facilities planning process that is used to estimate the courts' space needs. This long-range planning process received the General Services Administration's (GSA) Annual Achievement Award for Real Property Innovation in 1998. In a January 2001 report titled, *Federal Judiciary Space: Update on Improvements of the Long-Range Planning Process*, the General Accounting Office (GAO) praised recent improvements the judiciary has made to the long-rang planning process.

While the judiciary's space requirements continue to grow, the AO remains committed to developing and implementing policies that both provide the courts with the space they require to complete their mission and minimize the costs associated with operating this space.

Investment in and Recruitment of Skilled Personnel

In a January 2001 report titled *High Risk Series - An Update*, the General Accounting Office (GAO) cites a key challenge facing the federal government as

"Acquiring and developing staff whose size, skills and deployment meet agency needs." The report goes on to state that "human capital shortfalls are eroding the ability of many agencies–and threatening the ability of others–to effectively, efficiently, and economically perform their missions". Although the judiciary was not included in this study, its findings are directly pertinent to the judiciary, in fact the judiciary's challenges are even greater than that of the Executive Branch's. While the judiciary faces the prospect of losing 40 percent of its employees to retirement over the next five years, we have additional recruitment issues, such as the recruitment of law enforcement personnel along the southwest border.

In order to address this problem, the AO has implemented several programs to enhance the courts' ability to hire and retain skilled employees. Examples of these programs include an employee-pay-all long-term care insurance program, and a flexible benefit program which allows employees to pay for certain medical care, dependent care, and commuter expenses on a pre-tax basis. Recognizing these as innovative new programs, the Congress is now considering or has approved some of these benefit programs for the Executive Branch. For example, Executive Branch employees are authorized to pay for health insurance premiums on a pre-tax basis and long-term care insurance will be available to federal employees in October 2001. Upon the Speakers request, the AO supplied the House with information on

the judiciary's benefits programs while the Congress was considering authorizing some of these programs. The AO is continuing to research potential recruitment and retention programs that address problems such as retaining information technology staff and recruiting law clerks.

Another program the AO has implemented that enhances court managers' ability to manage their staffing needs is the Court Personnel System. This initiative provides court managers with increased flexibility to structure their workforce efficiently by decentralizing decision-making authority from Washington to the local level. For example, given an individual court's circumstances, local court managers have the authority to determine how many information technology staff are required to effectively operate their court's business within its funding allocation.

The AO, in support of the Judicial Conference, will continue to be a leader in the federal government in the development of innovative programs that enhance the courts' ability to hire and retain skilled staff.

Automated Systems and Technology Advances

Under the guidance of the Judicial Conference Committee on Automation and Technology, the AO continues to study and invest in technological innovation to enhance the quality and efficiency of court proceedings, to improve the services to the bar and public, and to reduce costs. The AO has an ambitious automation

program underway, with several major projects in various stages of development and implementation. While all of these projects enhance court operations, they will also require a sustained commitment from the AO over the next several years to complete their design, install them in the courts, and train and support court users on an ongoing basis. A few examples of the automation programs managed by the AO include:

Videoconferencing - To date, there are 200 federal court sites equipped with videoconferencing capabilities. The courts are using this equipment to conduct a variety of court proceedings including pretrial, civil and criminal proceedings, prisoner matters, sentencing, settlement conferences, witness appearances in trials, arraignments, bankruptcy hearings, and appellate oral arguments. The courts are also using this technology for administrative meetings, conferences and training seminars.

Case Management and Electronic Case Files (CM/ECF) - This new system will provide the courts with a new more efficient case processing application that will allow court staff to focus their effort on ensuring more effective case management practices. The CM/ECF system will also include electronic case filing capabilities (which will be implemented at the individual court's discretion) allowing judges, court staff, attorneys and others to send and retrieve case documents over the

Internet without leaving their desks. A version of these applications is already installed in 14 bankruptcy courts and seven district courts. Other federal agencies and state courts have been following our progress on this system and, seeing our work, are beginning to explore how they might adapt such a concept to their operations.

While providing substantial qualitative and quantitative benefits to the courts, this system is consuming a substantial amount of AO staffing resources in the development, testing, installation, and training of court users.

Electronic Bankruptcy Noticing - This system operates like a sophisticated e-mail system by transmitting bankruptcy notices electronically and eliminating the production and mailing of papers. Internet e-mail and fax options make this program accessible to virtually the entire bankruptcy community.

Federal Judiciary Television Network (FJTN) - In fiscal year 2000, the judiciary completed implementation of the FJTN, a satellite-based distance learning network. Each day the network provides more than eight hours of educational and training broadcasts to over 285 locations throughout the judiciary. The programs provide information on a wide range of issues such as supervising offenders and defendants, the law clerk appointment process, and statistical reporting procedures. The FJTN, along with other distance learning techniques such as videoconferencing, videotapes

and computer-based training, allows the AO, the Federal Judicial Center and the U.S. Sentencing Commission to deliver high-quality training and instruction to a larger audience at reduced costs compared to traditional classroom instruction.

Federal Law Clerk Information System - This Internet-based application implemented by the AO allows judges to post law clerk position announcements nation-wide and to monitor the availability of applicants. It also provides law school graduates the ability to locate opportunities to clerk for a federal judge using a nation-wide database instead of contacting individual judges.

Core Administrative Systems - The AO is in the process of modernizing many of the courts' core administrative systems including the financial accounting system, the personnel management system, the jury management system, and the Criminal Justice Act panel attorney payment system. These new systems are designed to improve the management of information, the tracking of resources, and the decision-making processes of the courts. While these new administrative systems are desperately needed by the courts, their successful implementation is dependent partially on the level of support and training provided by the AO during each system's implementation. The AO needs adequate funding to ensure the courts get the support and training required.

Expansion of the Rule of Law and the Administration of Justice Throughout the World

The AO supports the Judicial Conference Committee on International Judicial Relations in coordinating the Third Branch's relationship with foreign judiciaries and organizations involved in international judicial relations, the expansion of the rule of law, and the administration of justice. Federal judges and AO staff provide information, training and expertise on a wide range of subjects such as: judicial independence and accountability, judicial ethics and discipline, court administration, civil procedure, and the selection and appointment of judges. Requests for assistance are made and funded by institutions such as foreign judiciaries, the United States Agency for International Development, the Department of State, and the World Bank.

Last year the AO conducted briefings for 57 foreign delegations, including 263 judges. A few examples of these programs include: a program for judges and court officials from Tanzania on judicial ethics and corruption; a program for judges from Russia on court administration; a program for judges from China on judicial administration and the use of automation and technology in the courts; and a program for the newly established bankruptcy court in Thailand on court administration. Last year, the federal judiciary also provided case management

assistance to the European Court of Human Rights.

Remote Supervision Technologies

In fiscal year 2001, the number of offenders under the supervision of probation officers is projected to be 103,900 and the number of defendants received for supervision by pretrial services officers is projected to be 33,300. This total of 136,900 persons under supervision is higher than the approximately 125,000 prisoners being house in federal prisons. In certain circumstances, supervision of offenders and defendants is a cost effective alternative to incarceration as the daily cost of supervision in fiscal year 1999 was $7.74 compared to $59.41 for the Bureau of Prisons.

While the number of persons under supervision is at an all-time high and projected to continue to increase, the population of offenders under supervision is changing from those on probation to persons released from prison. Offenders released from prison typically pose a higher risk to the public as they have difficulty transitioning from prison to our communities, are more likely to require substance or mental health treatment, and have committed more dangerous crimes.

In order to address these problems, the AO is assisting probation and pretrial services offices in exploring the use of remote supervision technologies to reduce the risk posed by certain defendants and offenders. These include technologies to

detect alcohol use remotely, to use automated telephone systems to verify an offender's location, and to employ global positioning satellite technologies to provide real-time continuous tracking of high risk offenders. Remote supervision technologies automate certain routine supervision tasks which free officer time for other supervision activities and allow probation and pretrial services offices to manage their growing workload.

CONCLUSION

Chairman Wolf, Mr. Serrano and members of the subcommittee, I hope I have met my goal of impressing upon you the integral role the AO plays in the administration of justice as well as the effective and efficient management of the resources this subcommittee provides the Third Branch. I am proud of the achievements of the AO and am committed to continue to improve the level of service the AO provides the courts and the public. I ask for your support in achieving this goal by providing the AO with the modest funding increase requested for fiscal year 2002. Thank you for giving me the opportunity to be here today, and I am available to answer any questions.

Mr. WOLF. Before we get to the film, and it is a good film—I saw it; I looked at it to make sure there was nothing——

[Laughter.]

Mr. WOLF [continuing]. Obviously you would not, but I just wanted to see it first before it was shown. So we will look at it.

But before we do, does not the Attorney General have some sort of moral obligation to advocate for you? Because so much of what takes place in your courtroom results or comes about as a result of the Justice Department, the Congress, and others?

It would seem to me that if you are not at the table, either through an official way but an unofficial way, because the Attorney General is involved in the selection of the judges; they obviously do the vetting of the judges as the time comes through, so it would seem to me that you would also want to meet with the Attorney General to urge him and the Justice Department—who I know you are independent of but there is a meshing there—to be somewhat of an advocate.

Because you are at a disadvantage. There will be other forces up here. You mentioned Agriculture. The wool growers will be here, and the cotton people will be here, and the dairy people will be here. The Secretary of Agriculture will be meeting with them.

There really will not be an advocate in the sense with regard to your situation. My sense is that the Justice Department, while not formally—and some of the tone of the questions are not, I mean I would perhaps be more adversarial in the sense of eliciting from the Executive Branch, and I respect the separations—but it does seem to me that the Justice Department and the Attorney General does have some involvement in the efficiency of the courts and therefore would be certainly an advocate or a champion, or at least someone who would speak up at that time.

That is just a feeling I have; perhaps it is a question for when the Attorney General comes before the Committee which we will ask. But do you have any thoughts on that?

Judge HEYBURN. Yes. Of course I think it is generally true that the Attorney General and Attorneys General over the years have been advocates for and supporters of the Judiciary. After all, they are our biggest "customer" if you will, and vice versa.

But on the other hand, they are focused on presenting their case for so many additional crime programs, and so many additional United States Attorneys to you, and that is the unique nature of our Federal system, that indeed, as Alexander Hamilton said so many years ago, the Judiciary is a powerful Branch but it is the least dangerous Branch.

We do not have the ability to lobby. You know, we come to you with a request that we believe is reasonable. And we come as a strong and independent Branch, but weak.

As to you, we rely upon you for the resources. We rely upon the Executive Branch to carry out the lawful orders that we enter.

So without the cooperation of both the Executive and Legislative Branches, then our power is weakened. And it is a mutual relationship and understanding that we have.

But, no, the Justice Department will not come here and lobby for our request. If you ask them, I think they would acknowledge that without the Judicial resources on the Southwest Border they could

have 10,000 more United States Attorneys and 10,000 INS Agents, and there is going to be a bottleneck.

Because at some point in time, Judicial officers need to make decisions that uphold the rights. I mean everybody has rights, and those people that are arrested on the border have rights. It is our job to make sure that whatever happens is done in accordance with the law.

And so we do come to you. Here we are. We are presenting our case, and no one else is going to present it for us. We do not have a lobbying group that has an interest, except I believe that every citizen in our country has an interest in a strong and independent Judiciary.

Judge MECHAM. Chairman Wolf?

Mr. WOLF. Yes.

Judge MECHAM. I certainly concur with what Judge Heyburn has said. Basically there is also sort of a conflict. They are competing for the same funds out of the same budget, too.

So they come up here and we would probably be urging at times—you might divert a little money from them to us, and the other way around. It is conceivable, at least.

But more to the point, we meet periodically with the Attorney General. When I say "we," I mean the executive committee of the Judicial Conference of the United States.

Last week we met with Mr. Ashcroft for the first time. We had a cordial meeting. We talked about various issues in which we were interested. He brought some in which he is interested.

We met with his predecessor, Attorney General Reno, and those before.

Although relationships are cordial, I have yet to see an Attorney General take a strong stand in favor of any particular segment of the Judiciary's budget. Although his charging policies affect what we do, if he decides he is going to follow certain charging policies say as he is now talking about where any crime dealing with a gun you can go into a Federal court, that is going to substantially increase the work of Judge Heyburn and the other judges of this country.

We are not faulting him for that, but that is going to be a big cost. We are going to have to come in and seek more money because of that charging policy.

He also stressed this with us. He is going to go very hard on Project EXILE, which you have down in Richmond south of you. He is also going to be very tough on drugs.

I do not fault that. The thing of it is, it is going to add work to the Federal courts. I can guarantee that.

The other thing is that Judge Heyburn is more of a statesman than probably most Attorneys General. His statement today calls for more help for U.S. Marshals. The reason is very simple. They are not giving us enough help to protect courts and judges.

They have a study saying they need 2000 more marshals than they have. We see it all over this country. They froze 600 positions and never filled them.

So we do support some parts of the Justice Department's budget. We hope you will be more generous than OMB is or the Justice Department is with the Marshals Program.

Then lastly, back in 1983 a treaty was struck between Chief Justice Burger and the Attorney General William French Smith because OMB and GSA were not providing security for the courts.

They would not give the Federal Protective Service enough money. So the deal was struck and we went after money in our budget for a Court Security Officer Program.

That Security Officer Program has grown since I have been Director in '85 to now from about $25 million to $206 million. We have 3,347 court security officers, and we turn the money over to the Justice Department for the Marshals Service who then run the Court Security Officer Program.

So we have a clear community of interest there. But I do not see a tremendous amount of support from the Justice Department over the years for the things we do in that area.

Mr. WOLF. Well the committee will do everything it possibly can. There was a man named Dietrich Von Hofer who 51 years ago was killed by the Nazis in a prison camp in Flosenberg Prison in Nazi Germany. He had the comment called "Cheap Grace."

It is really somewhat Cheap Grace to be asking for increased law enforcement and increased arrests here and there and then not have the ability to deal with it at the other end. It is like a large truck with a very large trailer pulling equipment and then having a little Briggs & Stratton lawn mower motor inside. It just does not work.

I was a probation officer after I got out of college for a period of time in the courts of the City of Philadelphia. We dealt directly with the jails, if you will, the prisons, if you will. So they go together and my sense is that if the Attorney General and the Justice Department is actively asking for increased enforcement and punishment and all those things, which in most cases I would probably agree with—some I would, some maybe not; it depends on how they come out with it—but it does seem to me that you really do need to take care of the Judiciary because you will then have cases thrown out. You will then have people who can appeal because of the denial and therefore they will be back out on the streets and doing the crime that those very people are trying to stop.

So we have two gloves. If we are out in the winter, just one glove is not enough. It does seem that it does go together. And I will ask the Attorney General at that time if he does not feel somewhat of a burden and an obligation, although he does not have the Constitutional responsibility, to at least make sure that we can have the efficient courts so that we can do this. That we do not lose a case where somebody who is a felon gets out and commits that crime again simply because the courts did not have the ability to do what they had to do, and therefore there is more crime.

So we could talk about this forever, but I do think there is somewhat of a moral responsibility on the part of the Attorney General on this. But let's show your video.

Judge HEYBURN. Before we do that, I know it is in my statement but I just want to make sure I personally introduce you to Judge Larry Piersol who is on our budget committee and is a District Judge from South Dakota who is with me.

Mr. WOLF. No relation to the pitcher, right?

Judge PIERSOL. None. [Laughter.]

Judge HEYBURN. Okay, let's see if we can cue-up that video. This runs 15 minutes.

[A video is shown and much of the dialogue is as follows:]

VIDEO. Our courthouses are not just a matter of the safety of judges or the safety of staff, but it is also a matter of the public.

Beginning in 1994 Congress created the Southwest Border Initiative pouring millions' worth of enhanced Federal law enforcement resources into the states along the U.S.-Mexico Border.

The initiative was designed to stem the flood of drugs and illegal immigration streaming into the United States. Now more than six years later the army of new Federal agents has indeed set arrest rates soaring. However, the court system in which those defendants must be tried and sentenced is in serious jeopardy.

To understand the magnitude of the problem, you have to understand that it is a challenge of big numbers and impossible geography. While most of the trafficking in drugs and illegal aliens along the U.S.-Mexico Border come through major ports of entry such as this one in El Paso, Texas, most of the border looks like this. Hundreds of miles of sagebrush and dust, perfect terrain to let drug smugglers and illegal aliens slip undetected into the United States.

We apprehend at the Las Cruces Station approximately 600 to 800 a month, with a majority—I would say between 70 and 80 percent—happening right here at this particular checkpoint.

We see a wide range of smuggling methods or techniques. The smugglers get very creative. They have connections with auto body shops, upholstering shops, different industries where they can use that technical expertise to try to bring things in. We will see very sophisticated compartments. We will see gas tanks that have been partitioned off. We will see gas tanks where the fuel gauge works but it has actually been partitioned off and there is dope in that.

You got something there? Show it to me! Go on, get it out of there. Show it to me! You think you got something there? Show it to me. Oh, good boy. Good boy.

What had just happened is as we were coming down to the lanes, going through a primary, Barry got an odor of possibly a narcotic and started going over a couple of lanes, along with the wind current, got to the vehicle and then he alerted from there the gas tank and rear tire area.

Now we take him out of the vehicle and bring him to a security office where we can take a closer look at the vehicle to find where it is located.

These packages here came out of the gas tank, all of these here. The bumper had four packages, which are these four packages. Secondarily, we climbed under the vehicle and looked under the bumper and you could actually see the wrappings of the material, the plastic sticking out under the bumper.

Every day seems to be a little different on the quantity. Some days we have more and some days we have less, but it always seems to be basically the flow of drugs doesn't stop around here. That's all we see. It is continuous.

In sleepy courthouses from Southern California to South Texas, like this one in Las Cruces, New Mexico, has been transformed into assembly lines of justice where criminal defendants are brought in

by the busload and packed into crowded courtrooms, while overwhelmed judges and court staff process them through a system that has been stretched to the breaking point.

We see criminal aliens, and have been seeing them for awhile, criminal aliens that have serious criminal records that we have been prosecuting for the past few years, that we continue to prosecute. I think every indication is that one of the reasons why there has been such a dramatic drop in the crime in this county and this district has been that a lot of the people who are committing those crimes are locked up for longer and longer periods of time. That is true also of the criminal aliens as it is with other specifics, but I think the greater issue is just the sheer number of cases, period, that have to be handled.

They are entitled to have their lawyers. They are entitled to go to trial. There are plea negotiations. There are motions. There are just court appearances. All that depends primarily on the court. I think our judges have done a wonderful job of being able to continue to handle the caseload, but they are doing it—you know, you can cut the fat at a certain point, but there comes a point in time where you have cut all the fat that you can cut, and then you start to cut into the muscles, and then you cut into the bone.

I hope that those that are watching this program realize that we have been operating under these increases since 1994. What is so frustrating to us is that there does not seem to be any long-term solution for our court where we really, because of our position next to the border, the cases are not going to go down. The cases are going to be there.

If there is a commitment to make the border safe and secure and not have drugs coming into our country, that is a long-term problem. We do not have the solutions to that. But since we are here, since we are on the border, I think we have an obligation to handle the cases that are brought to us.

And part of the problem has been there has been an increase in law enforcement personnel on the border in the last five years, over a thousand positions, new positions created. There has been no increase in District Judgeships. And in fact a decrease.

Many of the Federal agencies in El Paso have built up their resources. When I came here in 1993 there were 30 DEA agents. Now there are approximately 100. When I came here, there were approximately 50 FBI agents. Now there are 150 FBI agents.

Most of the agencies in El Paso have doubled or tripled in size, including the United States Border Patrol. We have 2000 Border Patrol Agents in the El Paso Sector. They produce a large number of cases with prisoners and bodies, and that is what the United States Marshals Service ends up with. We end up with the actual bodies.

When I came here in 1993 we had 300 prisoners on an average day's count. Now we have 1300 prisoners on the average day's count, and we have roughly the same number of Deputy United States Marshals that I had in 1993. We have the same number of vehicles. As a matter of fact, I have some of the same vehicles that I had when I came here in 1993.

It is normal. The first day I come, I pick juries. This week I picked three juries. There have been weeks when I have picked

seven juries in a day. Then, we start trying the cases. Then I have to do the pleas and sentences after hours because I don't want to take the jury's time.

So it is normal that we normally start court before 8:00 o'clock and we normally go in the evenings until 7:30, 8:30, 9:30. Tuesday we went until 10:00, and Wednesday we went till 9:30.

You work people that hard—and I do not know any other option—but you work people that hard, you work the defense lawyers, the prosecutors, you see it in their faces. You see it in the way they carry themselves. They are exhausted.

The Marshals, I really—watching them last night, I really wondered where they were going to find the energy to make another late night run last night, and an early-morning pickup this morning.

A lot of times this means we go to work at four o'clock in the morning and get home close to midnight. That happens on a fairly regular basis.

It takes its toll on people, the pace. I see people cutting lunch short, skipping lunch, coming in very early, staying very late at night. You know, these are people who have families. They need to be with their family. They have other activities with children, and yet their devotion to their duty takes its toll on other aspects of their life.

Five out of our ninety-four districts are handling more than a quarter of our criminal load. And when you have those kinds of numbers where roughly 7 percent of our districts are handling a quarter of the load, there is definitely a problem.

As far as space components, resources, I am afraid that unless they get the resources to us now, that any efforts will be too late.

The bottom line is that our need for additional district court judges is our most crucial need. Because the way the system operates, the funding, the courthouse needs, all of that, are driven by the number of authorized district judgeships.

So the first and the most important thing you have to address is how many authorized district judgeships you have. If we can get our number of authorized judgeships to the level where we need it, then the rest of what we need by way of additional staffing and space will follow.

All of the courts have been trying to solve the problem, and it really isn't our problem.

It really is a problem that we do not have the resources to handle, but we are so terrified about dismissing a case for Speedy Trial Act, because once we do that, it is Johnny bar the door.

I mean, there will not be one defendant. Why would a defendant willingly take five, six, three years, two-and-a-half years, if he or she can earn a dismissal? I mean, if they had the chance, a one-out-of-ten percent chance, they are going to go for that.

And so that has been our problem, and I know that is what all of my colleagues on the other Border courts have dealt with, is thinking we have got to get these numbers through.

Unfortunately, I think we have to come up with new ideas and ways of trying to move these cases along. I think justice suffers because we are not able to give each case the attention it deserves.

We look to cut corners and ways to make things more efficient. And I just feel uncomfortable about how we are forced to do things. And then you have Congress and others looking at us and saying, well, why are things being done this way? That is not the way we intended for things to be done.

Unfortunately, if we are going to be able to keep up with all the cases that we have, we have to find ways of cutting corners and taking care of these cases.

And I think all of us feel uncomfortable with doing that. Because once you start cutting corners and finding ways to move cases along, it is real difficult to go back to the way it used to be and the way it should be. But that is the only way we are able to keep up with the tremendous amount of cases that are being filed on a weekly basis, on a monthly basis, in each of our courts.

If we take shortcuts along the Southwest Border, the appeals from those shortcuts, the defendant who feels that his rights have been impaired, appeals that case to the Court of Appeals for the Fifth Circuit, for example, and if we accept some shortcut that impairs the Constitutional Principles that are involved, that then becomes the law not just for the Southwest Border, but it becomes the law throughout the Circuit. It is the law in Dallas. It is the law in Shreveport. And it is the law in Jackson, Mississippi.

So I think the greatest challenge that this entire problem presents is the challenge of maintaining the Constitutional principles that are involved in the face of this enormous volume and the enormous demands on our personnel and our resources that this volume presents.

So you cannot have a rule of law for the Southwest border than is different from the rule of law that obtains elsewhere in the country. Ultimately, it will be the same. So that every citizen of this country has a stake in what is happening along the Southwest border. They have a stake not only because the drugs that are coming across that border are destined for their city and for their children, but they have a stake also because the rule of law that emerges from this is going to be the rule of law for them as well as for the border. So every citizen in this country has a stake in what is happening on the Southwest border, a vital stake.

VIDEO. With arrest rates reaching ever higher levels, the crisis in the Southwest border deepens with each passing day. Outmanned and underfunded, the judges are in a desperate race against time to keep up with overflowing dockets and hold together a system that is fraying at the edges.

With one eye on Washington, their only hope for desperately needed additional resources, and one eye on the clock, they are keenly aware that time is running out.

For the Federal Judiciary, this is Dana Cunningham in Washington.

Judge HEYBURN. I think it speaks for itself. I do want to correct one slight misstatement I made, and that is that there are 18 requests for new judgeships along the Southwest border that have not been acted upon. There are 8 vacancies that have not been filled, not in California, but along the Southwest border.

So it is a total of 26 judgeships that one way or another are either not authorized or not filled, and that is really the essence of the problem as we see it right now.

So thank you for taking the time to look at that. I hope it was informative for you. Myself and everyone else here would be glad to respond to any questions that you might have. Congressman Latham, welcome, and others.

Mr. LATHAM. Good to see you.

Mr. WOLF. I thank you very much. I am going to recognize Mr. Serrano.

And just the way that we have tried to do this on the Transportation Committee was as follows. We treat everyone fairly.

One, generally recognize members as they come in with some obvious exceptions. Secondly, I will go from majority and minority back and back and forth.

And thirdly, I have never in the last six years, we have never limited anyone to five minutes. If somebody feels passionately about an issue and wants to talk for, you know, we were just asked obviously if it goes on beyond maybe take a break and give it to somebody else. But nobody will be cut off in the line of questioning, because I know people feel passionate about issues that I sometimes and Mr. Cramer welcome that here. So with that, I will recognize Mr. Serrano first.

Mr. SERRANO. Thank you, Mr. Chairman. Let me first say that I will be submitting some questions since I have quite a few and I do not want to take that much time up.

Just a clarification. You said that 27 percent of all the cases——

Judge HEYBURN. Criminal cases.

Mr. SERRANO. Okay. Are handled by?

Judge MECHAM. Are filed in those five courts. It was restated——

Mr. SERRANO. Now does criminal include crossing the border?

Judge MECHAM. If they committed a crime.

Mr. SERRANO. If they commit a crime. So that is not, 27 percent is not people who are coming into——

Judge HEYBURN. Who are actually tried.

Mr. SERRANO. I am asking is quote/unquote "illegal immigration" part of the 27 percent?

Judge HEYBURN. Well this is 27 percent of the federal felony cases filed across the United States are filed in those five districts.

Now there may be many people who are arrested who are not charged with a federal crime for one reason or another just because of the numbers, they are dealt with through Immigration. There could be lots of ways that they could be——

Mr. SERRANO. But my question is obviously if a person is caught with drugs, that is a federal crime and that is part of the 27 percent.

Judge HEYBURN. Yes.

Mr. SERRANO. But is crossing the border itself a criminal issue being handled here? Or is it Immigration just takes you and sends you back?

Judge HEYBURN. I think the answer to that is that yes, it is a criminal offense. But I think the other answer is that typically simply crossing the border does not result in federal charges that are handled in federal court.

Mr. SERRANO. So my question is if that 27 percent includes just crossing the border?

Judge HEYBURN. No. There are approximately 1.6 million individuals who are arrested on the border for all kinds of violations, a lot of which is illegal entry. Approximately 1 percent of those are charged with federal crimes.

So I think that gives you some idea of how the system is triaging, if you will, this massive influx of, some of it low-level crime, some of it very high-level crime. But that is how we are dealing with it.

Mr. SERRANO. And I would just like to know from all of you, obviously we see the problem here and the problems that exist throughout the nation. But what is the process that you use to determine that you need additional judgeships?

And secondly, throughout the testimony I have seen the phrases "weighted caseload" and "judicial emergency". Could you tell us what they are?

Judge HEYBURN. Yes, I would be glad to. We have a formula that we use to determine what the caseload is of any given district. And we start out with the number of cases. But as you I hope can appreciate, a simple Immigration case takes up a lot less time than a massive securities case or a 20-person drug conspiracy.

So we have developed formulas based on interviews with judges and probation officers and others in the system that we give a statistical weight to each case. We apply that to the particular caseload in a given district and we come out with a number.

And, for instance, in a given district, the average for a judge may be 400 cases. But in one district, the weighted caseload might be 500 in another district because it is a totally different kind of case, the weighted caseload might be 300. And it is our attempt statistically, and this is updated periodically. As a matter of fact, right now we are in the process of updating it again. It is an attempt to quantify the actual workload.

Then the Judicial Conference has made a judgment as to what should be the average caseload of an individual judge and a weighted caseload limit above which we will ask for additional resources. That number happens to be I think 470.

Judge MECHAM. 430.

Judge HEYBURN. 430 for district judges. So once the average caseload of a district gets above 430, the responsible Judicial Conference Committees will look at that situation—that is an alert. And they will look at other factors to see whether there are any other factors which would suggest that they do not need additional resources for some reason or another—this is an aberration, a temporary situation.

And then they will make the recommendation to the Judicial Conference either that we should request or not request additional judgeships.

It is a process that probably takes nine months to a year to get to fruition and goes through probably two committees and plus a final vote of the Judicial Conference. And then of course we convey that recommendation to Congress, and usually there is a bill posted that will request the judgeships that the Judicial Conference has approved.

I would be glad to go further. But it is quite an extensive process. It is primarily based on statistics and workload, but also there is some intuitive judgment there as to what is actually going on in a given district.

Judge MECHAM. Mr. Serrano, just to give you an idea, the Southern District of California we have been talking a lot about here, the average caseload of each of those 8 judges is over 1,000. And the typical caseload for a full-time judge is 430 before you can justify getting a new judge. That is one of the reasons they need 8 judgeships to get them up to an ability to deal with the workload.

Judge HEYBURN. They have 8 judges now, and we have requested an additional 8.

Mr. SERRANO. Now let me ask you. We all know and we have mentioned that since 1990 the Judiciary Committee has not passed a bill adding judgeships. And so we added some in the Appropriations Committee. Did that meet the needs at that time that you were asking for?

Judge HEYBURN. Well, as I said, it did not meet——

Mr. SERRANO. Did it fall short?

Judge HEYBURN. It did not meet—it addressed some of the needs. Just looking at the Southwest border, we had requested 22 new judgeships on the Southwest border, and 4 of those were filled by the latest bill.

Over the entire country, I think the request was on the order of 54—61, excuse me, 61. And the latest bill approved 10 I believe.

Judge MECHAM. We need 54 new nationally.

Mr. SERRANO. All right. Let me just clear something up. You keep talking about a number that has not been filled. I think 8 was the number you mentioned.

Judge HEYBURN. There are two numbers that we need to look at. One is a request for a new judgeship which has not been authorized by Congress.

Mr. SERRANO. Right.

Judge HEYBURN. And that is what I was referring to on the Southwest border. We have requested 22 new judgeships last year. Four were authorized. So there are 18 that have not been authorized.

And then there is what we call a vacancy where Congress has authorized the judgeship but it has not been filled. And along the Southwest border, there are 8 of those.

Mr. SERRANO. Well, what is the problem there?

Judge HEYBURN. Well, sometimes the Senate and the Executive branch cannot agree on who should be the next judge. It is not a process that we are involved in, although our position is of course that vacancies should be filled. And in fact, the Judicial Conference, that is our position.

It is also now our position that where in fact the Judicial Conference believes that a vacancy exists and the caseload does not justify filling that position, then we have notified Congress or the Senate of that.

So we are not just always in favor of more. We also advise the Senate when we believe the caseload, you know, the demographics of our country are changing. The Southwest is growing. There are other areas that are not growing, and we have I think the latest

there are four districts where we have advised the Senate that they do not meet our numbers for the necessity of a new judgeship.

Judge MECHAM. Currently there are 94 vacancies in authorized judgeships that need to be filled. And I would guess there is at least one in the district of every one of you here that ought to be filled.

Judge HEYBURN. And that is on the high end of what would be an average vacancy. There are always vacancies, of course. But 94 vacancies is on the very high end if you look over the last 6 or 7 years.

Mr. SERRANO. I have one last question, Mr. Chairman, for this round. While I realize that honoraria in no way deals directly with the pay issue, it was discussed and included in the Senate bill last year. Has the Judicial Conference taken a position on honoraria?

Judge MECHAM. The Conference is against honoraria. You could have honorarias prior to 1989, but when the Congress determined that the judiciary should get a pay raise along with the members of Congress in the Ethics in Pay Act, they sort of took a pound of flesh from the judges. And you said you cannot get honoraria. You can augment your income by no more than 15 percent. And senior judges have to work a certain amount of time before they can be eligible for a COLA.

The only trouble is, during 4 of the years since then, during the '90s, Congress did not provide the COLAs that they were promised. The judges' pay went down the equivalent of 13 percent net during that period of time. So they were 13 percent worse off now, as you are, too, by the way, because you are affected by the same thing.

And so the promise has not been——

Mr. SERRANO. A great lobbying effort. [Laughter.]

Judge HEYBURN. We also advocate on behalf of the Legislative branch as well. [Laughter.]

Mr. SERRANO. So you still just want to deal with the issue through a COLA and pay increases and not any other way.

Judge HEYBURN. Yes.

Mr. SERRANO. Thank you, Mr. Chairman.

Mr. WOLF. Thank you. Mr. Latham.

Mr. LATHAM. Thank you, Mr. Chairman. And just as our first hearing of attendance, I want to tell you, I look forward to working with you and the Ranking Member and everybody on the Subcommittee. This is a great Subcommittee if you have not served on this before. It has such broad jurisdiction, and I look forward to working with you.

I guess I have one question about the defender services appropriation for fiscal year 2002. And welcome. I appreciate seeing all of you again.

It totals $521.5 million, or 22 percent increase over fiscal year 2001.

Judge HEYBURN. Right.

Mr. LATHAM. Yet the workload or the increase in filings is only up 5.2 percent. You have over 20 percent. I know you want a pay increase for people you hire outside to come in up to $75 up to $113, but that only amounts to about $35 million. Where is the rest of it?

Judge HEYBURN. The total request, about $35 million would be for the increase.

Mr. LATHAM. Right.

Judge HEYBURN. About $23 million is for workload increases. That is, the additional representations. And last year we had a carryover balance in the defenders of about $11.8 million, which we are applying to 2001. So that is really part of our base.

And in order to maintain the base, then it is sort of an artificial accounting matter. We need another $11.8 million. So in terms of the actual increases, there is really about—it is really about $75 million, about $35 million of which is the—well, about $40 million of which is increase, pay increase, panel attorney increase or defender services, and roughly half again, about $35 million, is workload increases of various different kinds. So it is sort of split.

Then the other, the $11 million is to restore what was carried over from the previous year that Congress did not need to appropriate. We had money left over.

Mr. LATHAM. But it needs to be reappropriated?

Judge HEYBURN. Yes. And of course if for some reason our estimates would not turn out to be accurate and there was money remaining in that particular fund, a carryover as we call it, of course that reduces the appropriation. And we keep the staff pretty well advised in all our accounts.

That happened last year, for instance, with juris fees that were about $9 million, $10 million less than we expected, and we applied some of that to various different accounts as authorized.

Does that answer your question?

Mr. LATHAM. Yes. Thank you.

In previous cycles I have been supportive of the Judicial Conference's efforts to maximize the use of the most current technologies and the Judiciary Information and Technology Fund was established to manage the information technology program. I just wondered, can you give us any kind of an update or estimate, any kind of savings that you have realized by employing this fund, what the new technologies and as far as the efficiencies or whether it has been successful?

Judge HEYBURN. Yes. We think it has been tremendously successful. We have detailed a lot of it in the report, The Optimal Utilization of Judicial Resources.

But whether you are talking about videoconferencing with prisoners' cases. We used videoconferencing on the Southwest border, electronic management of case files so you can have electronic filing of pleadings, and electronic access of cases cuts down the work of clerks.

Bankruptcy noticing, electronic noticing in bankruptcy cases, which has saved probably millions and millions of dollars in these high volume type cases where you have hundreds of defendants or parties sometimes.

The FJC Judicial Television Network where we have long-distance learning and we have programming every week for judicial employees where they are able to improve theirselves and they do not have to travel long distances to obtain education on new computer programs or new financial issues or new benefit issues.

We have got a law clerk information system set up on the Internet now so it reduced the time that the staff has to deal with the hundreds of applications we get every year for law clerk positions.

Probation is using remote supervision technologies. And with the huge increase in the number of folks that are supervised by federal probation officers. More people—there are 129,000 persons who are now supervised by federal probation officers. That is more individuals than are in the federal prisons.

Mr. LATHAM. How many are electronically monitored?

Judge HEYBURN. Personally, we use it all the time. It is a very, very valuable tool, you know, particular in a situation I mentioned before, where you have someone, you know, you maybe have a question about them, but they do not seem to have a dangerous past.

They have a job. They have a family to support. The trial may be six months away, and, you know, you want them to be able to support their family. You do not want to let a dangerous person loose on society.

And sometimes electronic monitoring is a good way of giving us that extra assurance we need that they can be out there and help their families and society will be safe, and it saves.

You know, otherwise, they would be in a federal penitentiary, and it costs $7 a day for federal supervision and I think $60 or $70 a day to have them in a federal penitentiary or a state facility that we lease. So the cost savings are absolutely huge.

Judge PIERSOL. If I could interject for a minute. In the Northern District of Iowa I think that they are using the next generation in their post-trial supervision where you can call up on a phone and there is a setup where they can monitor whether somebody, for instance, has been drinking or not, over the telephone.

Now we do not have it yet in South Dakota, because it is expensive. But that is just the next level beyond the current monitoring which we are all using in pre- and post-trial supervision.

Judge MECHAM. Chairman Rogers shared your great interest in technology and he asked us to provide a term paper on the technology, which we were happy to provide him.

Mr. LATHAM. Did he grade it for you too? [Laughter.]

Judge MECHAM. We hope we got an A. Well, if we are successful he will grade us. Hopefully it will be the final mark.

Mr. LATHAM. Okay. And I will look at that. I appreciate it. I think you bring up a good point. Is there a big difference regionally in technology and the ability when you talk about videoconferencing and things that you are using, are there some parts of the country that do not have access to it, some do? Is that a problem?

Judge HEYBURN. I think the fair answer to that is that some parts of the country need it more than others. The caseload is such and the volume of the caseload and the repetitive nature of them is such that video and long-range technologies are more conducive to use in certain areas.

Certainly in the larger cities where you have large prison populations, along the Southwest border. In Kentucky we use it some for videoconferencing involving prisoner cases from state prison so

you do not have to bring a prisoner, use a U.S. Marshall all the way from a state facility to the federal courthouse.

I do not know whether you have any in South Dakota. There may not be as much of a need for it.

Judge PIERSOL. Well, the prison is right where I am. And frankly, if I am going to have a prisoner there, I am going to have him there in person. That is a personal choice that I make. But it is used in all sorts of other ways.

I mean, we have not been talking about civil cases. Out where I am with all the distances there are, I often have lawyers from Chicago or New York City or maybe just from Rapid City, which is 350 miles from me but still in South Dakota. And I have arguments by telephone because it saves the clients money basically.

That is done commonly. And we have some videoconferencing capability, but it is kind of limited with regard to that sort of thing. But I really do not need to see the lawyers for that kind of argument.

But with just good telephone systems you can do a lot, and we are doing it.

Judge SMITH. Could I take that one step——

Judge HEYBURN. We have had also, because of the problem along the Southwest border, we have had a number of judges who have volunteered to take cases along the Southwest border. Because obviously the criminal cases become the priority. You have got to handle them or they are subject to dismissal because of speedy trial.

So the judges there are overwhelmed by the criminal cases, and we have visiting judges that come in and do a lot of the civil cases.

Some of the visiting judges, I know a couple of them have actually conducted trials by videoconferencing. A couple of judges from Boston have conducted trials in Arizona by videoconferencing. It is maybe not the preferred method, but when everybody agrees, it is certainly a cheaper method and it works.

Mr. LATHAM. Were they court or jury trials?

Judge HEYBURN. They were court trials.

Mr. LATHAM. I think Judge Smith had something.

Judge SMITH. I was actually going to talk about the video trials, the same thing that you just talked about.

But I would just issue one caution. I think all of this is wonderful, but I think we all as judges and members of the legislative body do need to keep in mind that there are some things you simply need to do face to face.

As Judge Piersol said, sometimes you just need to have that person there where you can look each other in the eye, and technology should not ever get the point I think where it overcomes that, and I know we all recognize that.

Mr. LATHAM. It may be a personal preference. You apparently like to see lawyers, and Judge Piersol does not like to look at lawyers. [Laughter.]

Judge SMITH. I was thinking more of the parties than the lawyers. [Laughter.]

Judge MECHAM. Mr. Latham, you are seeing one example of how we are using technology today. This is one of our cameras and outstanding staffers from the FJC–TV group. We have 285 downlinks.

We cover virtually everyplace in the country now. We use it for training and management. This hearing we broadcast to every judicial branch employee, including judges, who wishes to see it as part of our training program.

Mr. LATHAM. Very good. Thank you, Mr. Chairman.

Mr. WOLF. Ms. Roybal-Allard.

Ms. ROYBAL-ALLARD. Thank you, Mr. Chairman. I know that the word crisis has not been used. However, if you look at the fact that we have the shortage of judges, that you cannot get panel attorneys, the need for courthouses.

It seems to me that our federal judiciary system is really approaching a crisis here that could seriously impact the fair administration of justice in this country.

And I think the example that was used—and I was glad that Mr. Serrano raised the issue, because I was going to use the example of what is happening in the Southern District of California where the acceptable load is 430 and judges have over 1,000 cases.

Also with the concern that you mentioned earlier about panel attorneys, you mentioned the $75 per hour in court. And I would like some clarification, because my understanding was that that is true of California and that Judge Hatter has asked for an increase. But in other parts of the country, the pay for out-of-court is actually $55 an hour, and for in-court it is $75.

Judge HEYBURN. That is correct. After the legislation was passed authorizing $75/$75 in 1986, for a few years the legislation gave the Judicial Conference the authority to, if the districts applied, to allow up to $75/$75. Most districts did not apply. So currently, there are only about 16 districts out of the 94 that have the $75/$75, and your district is one of them.

Ms. ROYBAL-ALLARD. Is one of them.

Judge HEYBURN. Most of the others are limited to $75 in court and $55 out of court.

Ms. ROYBAL-ALLARD. Okay. And you mentioned that the $113 was still below what most attorneys would get paid?

Judge HEYBURN. Oh, yeah. This is still—I mean, I think everyone views this as basically a pro bono effort, if you will. And the idea is not to pay these panel attorneys what they could get in their regular private cases but to pay them enough to encourage quality representation.

And I do not mean that we need to—you know, we would hope that as a matter of public service the best criminal defense attorneys would participate in the panel attorney program. And in many, many districts they do.

And they recognize that it is a part of public service, and we are trying to make sure that they can cover their overhead and that sort of thing and pay them enough to encourage them to participate.

To answer your question about the crisis, I think it is fair to say that there is problems approaching crisis proportions in some districts, but not throughout the entire country.

And also the judiciary, you know, we recognize our responsibility. We just don't sit here passively and accept the fact that there are burgeoning case loads and problems in districts.

We go to great lengths to address these problems. We have visiting judges that come to districts that are in trouble. We have visiting probation officers that come to districts that are in trouble, and we try to mobilize our resources to address these problems.

At a certain point in certain districts, and I think we've certainly focused on the Southwest Border, but there are others around the country. It just becomes, you recognize that it's not a temporary situation and you really need permanent resources to deal with the problem effectively.

I think that's what we're all saying. My district, we are fine. We have a relevantly stable case load that is gradually rising. All of our vacancies are filled and, you know, we are able to deal with our situation.

So our judges, we have a judge who goes to Arizona and helps out there, for instance, when he can.

Ms. ROYBAL-ALLARD. I would like to also address the whole issue of court security. I know that that has been a priority and in the past, last year, we were not able to help you in that particular area, and I am getting a first hand taste of the importance of the security because the trial of Ahmen Ressem is being held in the Federal Building where I have my office.

Can you elaborate a little bit on what these funds are specifically needed for to address the problems that you are concerned with? I know that a lot of these federal cases are very high profile events and that security, good security and effective security is really needed.

Judge HEYBURN. Yes. There are a couple of different aspects of it. The request that we have is about $228 million. About $190 million of that are for the court security officers that provide the security to courthouses.

And the increase we are asking for there is basically inflation where there are new courthouses and new CSOs are needed, we are asking for that.

But a lot of providing adequate security involves the technology of the video surveillance, the scanners that we need in all of the courthouses, and upgrading, after they are ten years old or so, hopefully more frequently than that, the kind of technology that we need to provide overall security.

And so we are asking for about $38 million, which is roughly what we had last year. It is really a continuation budget to continue that program and to provide the kind of security around the courthouses.

Now the other aspect of it is the marshal service. In these high profile trials, not only do we need the judicial resources, but the marshals' resources, and that is a tremendous expense, as you can imagine, as you are seeing.

Ms. ROYBAL-ALLARD. My understanding is also that right now, the kind of detectors that you have are metal detectors and many of them cannot detect plastic explosives at this time.

Judge HEYBURN. Right. Yes. And part of the request involves the replacement of these old detectors that have not kept up with the advances of those who might be interested in causing a problem. And we are trying to accelerate the replacement of all those machines in the federal courthouses.

Ms. ROYBAL-ALLARD. One more question has to do with the courthouse construction. It is my understanding that the Bush Administration has included $500 million in funding for courthouse projects in their 2002 budget blueprint.

And not only is this less than what the Judicial Conference had asked for, which I believe was $664.8 million, but that amount also includes the $276 million of advance appropriations for projects that were included in the 2001 budget which, in reality, then makes the President's request, $224 million.

First of all, I want to know if that is correct information, and if it is, how do you see this low request for courthouse construction, how is that going to impact you?

Mr. MECHAM. We are not completely sure yet if that $276 million that was advanced funded in 2001 is part of or not part of the $500 million you referred to.

We think that your analysis is correct, however, and we have gone to the head of OMB and suggested that that would only give us a third of what we really need if that is the case.

So we are hoping that Mr. Daniels and company, when the final budget comes up, will have higher figures than that, but we are not planning on it.

But you are quite correct that if $276 million is sort of double counted, I guess, that means we will only have $224 million for all the projects of which we have scheduled for this coming fiscal year, and we are going to be very, very unable to go very far down the list of the 20 projects we hope to build.

Ms. ROYBAL-ALLARD. Okay. That just leads me to my final question because I am really not clear now in terms of the relationship between the judiciary and OMB. My understanding was that you would submit the budget, and it was to be accepted as is without any tinkering.

But what I hear you all saying is that in one way or another there is some tinkering going on which is, I do not know what the right word is to use, but that should not be happening.

Is my understanding correct?

Judge HEYBURN. Well, first of all you have to separate our request for an appropriation, which the law says must be submitted without change, and the request which the General Services Administration, which is in charge of the Federal Building program, they make a request separately for an appropriation that goes through TPO for buildings.

And they ask for our advice about what kind of new federal courthouses are needed, and it is a remarkable improvement from years ago when it was pretty much of a whoever had the political muscle to get a courthouse built.

We study all the needs based on available space, projected new cases and new judges, and we make a recommendation, the Judicial Conference makes a recommendation based on an actual score—we score each proposal—we make a recommendation to the General Services Administration, this is what we need.

And the Director can comment more fully on what happens after that.

Mr. MECHAM. We are basically dependent on GSA and OMB for buildings; we are supplicants. And even though you would think

the tenants would have a little more control over the program for buildings of which they are tenants, we have very little.

And any help you could give us with GSA and OMB would be very much appreciated.

Judge PIERSOL. Well, I'm in a position where we have a little over a hundred-year-old courthouse and we are making an addition to it, so South Dakota is down the line. But what happened, the net result of course is slippage. When there is inadequate funding, even if the scores are maintained, everything slips in terms of years, as you know.

Ms. ROYBAL-ALLARD. Yes, I do.

Thank you, Mr. Chairman.

Mr. WOLF. Mr. Kennedy, just so you know, there is one 15-minute vote and three fives. We'll wait, I'll wait until there are two minutes left, and we'll just recess and then come back in about 15 minutes

Mr. KENNEDY. Thank you, Mr. Chairman.

I want to follow up on Ms. Roybal-Allard's question about the GSA. What is it that we can do to facilitate a better working relationship between the GSA and our court system.

We have a court problem up in my State of Rhode Island that Judge Tores was talking to me about. They have been out of their courthouse for 28 months. They have gotten little to no cooperation from the GSA. It is absolutely a mad house up there. You have security problems and the like.

It seems to me, Mr. Chairman, this is a problem that Ms. Roybal-Allard brought up last year. It is an endemic problem to the whole system.

We need to figure out a solution to this GSA issue because if we are the tenants and these GSA folks are not complying with our needs, then we are going to have real problems that we are facing.

I suppose I have already given an answer to my own question——

[Laughter.]

Mr. KENNEDY [continuing]. But if you can recommend any specific things that we might be able to do to send GSA to work more closely with you all, that would be very useful, and I would appreciate anything that you can give the Committee in terms of recommendations.

Ms. Roybal-Allard basically covered my questions about the panel attorney increase and the court security, but in following up with that, it just seems to me we have had numerous stories over the last couple of years about people that have been convicted, and wrongly convicted, and now those convictions overturned because of evidence and because of the fact that we are seeing real deficiencies in legal defense for indigents in this country.

We have the Attorney General of the United States put a report forward about the disparities in race in our federal judiciary in terms of those who are on death row. That report I have not yet seen, but I am anxious to take a look at it.

But it all points to the fact that we do not have enough competent—it seems to me, maybe more on the state level, but certainly I am sure it affects the Federal Judiciary as well—representation for those without legal defense.

And the notion that we are going to under-fund these panel attorneys as well as Legal Defender Services, to me, seems like we are only exacerbating the problem of more and more Americans getting wrongly convicted because they have inadequate defense.

So it seems to me where this Congress is focusing a lot is on these issues of the innocence of many Americans who are wrongfully convicted and it would just make sense that we do not want to exacerbate it by under funding the legal defense of our people that our panel attorneys are responsible for.

I want to make another couple of political statements, Mr. Chairman. [Laughter.]

Mr. KENNEDY. When I heard that tape about the Southwest Border, I mean it is clear to me that we have a real, real crisis on our hands there. I am anxious to join with the Chairman in trying to do the best we can in fulfilling your needs, along with the Judiciary, to get more judgeships because it does seem to me a crisis in the making.

It seems to me we are creating a permanent prison class of people in our Judicial System, both federally and by states.

This Committee or probably the Judiciary Committee, should probably keep some mind's eye towards it, because all of our judges that spoke on that video kept talking about a long-term problem that has no solution.

And it seems to me, unless we do more in the way of increasing the requests that you have made for probation and pretrial services in the areas of mental health, that seems to me one long-term solution to the endemic problems of our societal issues with people getting caught up in the criminal justice system.

You point out, in your testimony, a couple of anecdotes of people who have benefitted from these counseling services that you do offer, but I might ask you to comment on the limited scope of those counseling and screening and services.

I mean the stories that are emerging now from our criminal justice system about the number of people who are suffering from serious mental illnesses or who have yet to be screened for problems that are clearly of a nature that we can address through our health care system to me seems to be another oversight on our part in terms of dealing with long-term solutions to these problems of our overcrowded Judicial System.

So maybe you could comment on the extent of our screening and counseling services in pretrial and probation services and what your recommendations are when everything else is taken care of as well for increasing perhaps those services.

Judge HEYBURN. Well, as you noted, we have recommended increased funding for some of those kinds of services and for the number of probation officers. You know, in a bankruptcy court, for instance, you have 50,000 more filings and, you know, there are certain things that clerks can do that are rather routine within the judiciary. And electronically you can improve efficiency.

Well, there's a limit to what you can do to make a probation officer more efficient, to do the kind of personal work that makes a difference in someone's life.

Mr. KENNEDY. Right.

Judge HEYBURN. And, you know, what we are doing is simply asking for the additional personal resources so these people are not so overworked that they can't be successful in the way that we identified in these anecdotes.

And I think they are more than anecdotes; these are things that happen all the time.

Mr. KENNEDY. Well, I appreciate it. I would love to roll back a lot of these mandatory sentences that take away your judicial power to do what you think is necessary so we don't have this overcrowding of cases of non-violent offenders in our jails taking up space that should rightfully go to violent offenders.

But one of the tools you need is to be able to have a better probation process so that you can follow up and not feel as if you are turning someone loose, but you have a way of following up with them.

And I would be interested in a really more detailed—and maybe staff could provide it for me—overview of what recommendations you have.

In my State, we have a horrendous system. We are spending all this money on the front side of incarcerating people and we have very few probation officers for our juvenile system and for our adult correction system and what we end up having is a recidivism rate which we all know is a major problem in our criminal justice system.

It is going unaddressed because we are not dealing with the root of the problem, and that is how to get people reintegrated into the community and starting, you know, successful lives.

So if you could provide any of that.

Judge HEYBURN. I would make one comment. I mean, obviously you have talked to many federal judges and you have a variety of different opinions about sentencing and that sort of thing as a matter of a policy discussion, which I think is appropriate for Congress to engage in, and we can give you our advice, or different judges can if you want it.

I do think, though, I do want to say that the federal system, as a whole, you know, does a marvelous job, you know, given what we have to do in difficult circumstances.

And this Committee deserves a lot of credit for giving us the resources to do that job. In my humble opinion, the federal system does, on the whole, really a much better job than many of the states.

Of course, they have a hugely larger number of people in which to deal with but, you know, because of the efforts of this Subcommittee, you know, you've given us the resources to do a very, very difficult job and these folks do it.

You know, I am just so impressed with how well they do it. And I came from a large law firm, and one of the things I wondered about when I became a federal judge is well, how hard will these people work? Are they just nine-to-fivers? You know, we work pretty hard in the private sector.

And I've just been so impressed, from the secretaries to the probation officers, everybody how hard they work.

Mr. KENNEDY. I want to make it very clear, at the very least, I am talking about endemic problems in the system because you are not given the resources you need.

And I think the stories of how hard our judicial personnel are working because of these incredible caseloads is just inexcusable. So I am just making a broader comment and I want to assist you in the job that you are doing. And anything that you can recommend in terms of probation and pretrial services that we can fund, I would like to see us do that.

Judge SMITH. Could I follow up on that, Mr. Kennedy.

One of the terribly important issues is not having probation officers but training them and educating them, and that is part of our mission along with training judges.

Because of budget constraints, we have had to eliminate almost entirely any face-to-face training for probation officers.

We have increased the type of distance training we have so that we are now using video conferencing or television network Web sites where probation officers can get together and exchange ideas.

If you would be interested in some of these video tapes or some of these publications that we have to see the types of things we are trying to make available, but obviously as they add more and more probation officers, there are more and more people in need of this training, and our resources are limited, so anything that could be done.

Mr. KENNEDY. That would be a useful subject that we could maybe get some more information on.

Judge SMITH. Sure. I would be happy to get it to you.

Mr. WOLF. We are down to about a minute-and-a-half. We are going to recess and come back

Mr. KENNEDY. I thank our panel for their great testimony today.

Mr. WOLF. We will recess and be back in about 15 or 20 minutes.

[Recess.]

Mr. WOLF. That's it for the day. So we'll have plenty of time. We'll have a number of questions we'll just submit for the record. But let me go through a couple that I marked.

When you talked about the Mexican border problems and U.S. border problems, what steps are being made to assure that other courts throughout the nation are not being shortchanged if you deal with that border problem?

Judge HEYBURN. Well, we have taken such steps, and they're not. The way we, within the judiciary, once we get an appropriation, we have also a formula based upon workload and a variety of other factors that determines how we allocate resources within the various districts.

And so those funds are allocated and positions are allocated in accordance with that formula.

Now last year during FY2000 when we were sort of short on our appropriation, we devoted some extra resources—well, a lot of extra resources to Southwest Border. And as a result, some of the other districts were shorted. But we thought it was necessary and everybody coped.

Mr. WOLF. So there is a shortchanging of some areas, then, if you do this?

Judge HEYBURN. Not this year. Because the Committee gave us an appropriation that was sufficient to fully fund all the positions.

Mr. WOLF. But with the growth that film indicated, that's a temporary. It looks like the caseload will continue to go up.

Judge HEYBURN. And that will require more resources. The situation now is we have fully staffed the Southwest Border based upon the judicial resources that we have there.

I think our basic position would be, it really wouldn't do any good to put more clerks there or even more probation officers there because there are not the judicial resources to handle it and they are not the Marshals' resources to handle it more smoothly.

So we believe we have adequately staffed it at this point.

Mr. WOLF. But Mr. Mecham talked about 94 vacancies countrywide. And the vacancies that you referred to in there, this budget does not address.

Next week the Judiciary Committee of the Senate, in cooperation with the Administration, appointed all these judges and they were out. This budget would meet those vacancies if they were filled? Or it does meet them?

Judge HEYBURN. Well, the budget——

Mr. WOLF. The salaries would not be met and their clerks would not be met.

Judge HEYBURN. Right. The budget that we have presented assumes, for instance, that this year there will be 25 new judges nominated and confirmed and next year there will be 63. So we don't assume that at a certain point all 94 of those vacancies will be filled.

Mr. WOLF. Okay. So this was assumed on 25. How close are the authorizers to moving, or how close is the Administration to sending names up? What is the timetable that you were led to believe is in effect?

Judge MECHAM. We believe they are ready to move quite swiftly, particularly on circuit judge nominations. I think they're giving first priority to that.

We know a lot of people who have been to town, been interviewed. And we think that that could be anytime now.

I think one of the problems is the FBI interviews and FBI clearance, which usually takes a protracted period of time.

Mr. WOLF. How long does that take?

Judge MECHAM. Well, normally, it would take two months, but I'm sure they're accelerating them for this purpose. I get the sense they're really moving to get nominations up to the Hill.

And district judges seem to be following along a little more slowly. I would guess we will see some circuit nominations momentarily. I notice the President did withdraw a number that President Clinton has sent forward. And I believe that was a precursor to getting some particular circuit nominations up there.

Mr. WOLF. Judge Smith, with regard to the international efforts, I agree with what you're trying to do. Maybe you could elaborate a little bit more briefly and maybe more for the record what countries have you involved in? Sierra Leone, Bosnia? Can you just briefly tell us and maybe give us more for the record?

Judge SMITH. Sure.

Mr. WOLF. And where does that funding come out of? AID?

Judge SMITH. Some of it comes from what was AID. I guess it's now been brought into the State Department, USIS. The World Bank has funded——

Mr. WOLF. And what is the total amount of money that you spent last year for this?

Judge SMITH. We don't spend at all.

Mr. WOLF. No, not what you spent for this.

Judge SMITH. We don't know, but we try to stay uninvolved from the funding. So in other words, we'll get a call, for example, from someone at State Department who might say we have 12 judges from India who are going to be in the States in a month, and can you design a program for them on case management or on, you know, the independence of the judiciary or judicial ethics?

And then we will do that with our own staff.

Mr. WOLF. Oh, you don't initiate it then?

Judge SMITH. We don't initiate it, no. Our mandate in the statute is basically that we should offer assistance to organizations who are in the business essentially of doing this type of work. So we don't initiate it. We respond to requests.

Mr. WOLF. Do you send judges to other countries?

Judge SMITH. We don't. The International Relations Committee of the Judicial Conference does. We do not pay to have judges go. We have arranged for some judges and for some of our staff, for example to go to foreign countries, again, when we've been contacted by a group.

One of our staff just came back from India where she discussed case management issues and alternative dispute resolution primarily.

I am actually going over to Slovenia in a couple of weeks at the request of the State Department and to Milan. I've been to India. We've brought a number of judges from Russia—or had a number. I shouldn't say brought. Had a number of visiting judges from India, from Russia, from China, from Pakistan, Latin America. We had over 300 foreign visitors last year come to the Center for various types of programs.

So we try to be as responsive as we can to any of these requests.

Mr. WOLF. Maybe you can just submit for the record then some of the countries or all of the countries that were involved—

Judge SMITH. Be happy to.

Mr. WOLF. And what came here, what judges, numbers came here and also the numbers that went abroad.

Judge SMITH. Certainly.

Mr. WOLF. The State Department comes before this Committee. I think it's very important that we share the values. The best export that we have is really our values. The Declaration of Independence is our charter, if you will, and as we take that abroad. And the people abroad seem to know that and an honest judiciary, whether it be in Macedonia or Bosnia or in Sierra Leone or something like that.

And I think it's just helpful to have and maybe as cost effective to have our people go there as well as it is to bring them here. You can do both.

But I think to go, and that way you can cut down the cost. But there may be some places that we would like to encourage the

State Department to tap in and to use your people and also retired judges or senior judges that may have more time.

Judge MECHAM. Chairman Wolf, you mentioned—Judge Smith mentioned the International Committee of the Judicial Conference. The Committee doesn't actually send judges. Usually the State Department or——

Mr. WOLF. I understand.

Judge MECHAM [continuing]. And so on, who pays their way.

Mr. WOLF. I understand.

Judge MECHAM. But that Committee particularly is focused on Russia and the old Soviet Bloc countries where the State Department felt there was a particular need to try and preach the gospel of rule of law and independent judiciary. So they spent a lot of time.

Mr. WOLF. Well, but there's Africa. There's Sierra Leone. There's the Congo. There's places like that would love to have them. Today's paper in Macedonia, there's fighting broken out. In Bosnia, Bosnia-Herzegovina.

I mean, all these places I think could use it as much as the fact is probably more than China. You might come here and learn a lot and go back to China, and you're going to do pretty much what the Chinese government tells you to do. But some of those are struggling democracies who really do want to change. And if you're 45 or 50, it's really hard. Your mind has been pretty much closed. And to have somebody come and open it up and give you these ideas.

So if you can let us see, and maybe we could when the State Department comes here encourage them and AID to tap into use more, particularly we certainly don't want to send a judge from Southern California to be sitting on the Southwest Border. [Laughter.]

Mr. WOLF. But maybe a retired judge or senior judge. And there is a program where they send former members of Congress to go abroad and teach and do those things. And I think that would be helpful.

Judge SMITH. Well, we will do that. Another aspect of that I'd like to include that I think is very exciting is a lot of these smaller countries are trying to establish judicial training schools of their own patterned in part on the Federal Judicial Center. And so that's a big interest so that they can train independent judges, and we'll include that in the information, too, as much as we have.

Mr. WOLF. Good. Thank you. Mr. Mecham, I read your testimony on the issue of recruitment and retention. And I have taken the opportunity actually with Ms. Roybal-Allard's father and Congressman Hoyer using the Treasury appropriations to put in place flex time and job sharing and leave sharing. Do you use flex time in the courts?

Judge MECHAM. We do certainly in the administrative office——

Mr. WOLF. Do you use job sharing?

Judge MECHAM. And in the courts as well.

Mr. WOLF. What about job sharing, whereby two people at an appropriate time in their life want to share a job?

Judge MECHAM. Very little of that, but yes, we have had some.

Mr. WOLF. Couldn't that be a good retention and recruitment tool to have a job sharing? Two people can do the job as well as one.

Maybe one wants to take care of a loved one who's dying, and another wants to maybe get an advanced degree. You're not paying any more monies. Studies show that two people who are job sharing are actually more productive than one person. How many courts use job sharing? Is it permissible? Can you give us for the record?

Judge MECHAM. I would want to yield to the judges on that. I know in the AO we have some. We do have extensive use of flex time and find that is a great morale booster. We don't think it lowers productivity.

Mr. WOLF. No, it increases.

Judge PIERSOL. I can comment.

Mr. WOLF. How about job sharing?

Judge PIERSOL. With regard first of all to flex time, we do flex time. But it would be something that would be decided by the clerk and the judges in each of the different 94 districts. And we've done a limited amount of job sharing, not nearly as successfully as flex time. But it's something that we can do.

Mr. WOLF. Well, I would encourage you to look at it. We're finding it is working very well. The problem has been on a lot of these flex time, job sharing, on-site child care, telework, midlevel manager just sort of thinks, well, this is a new idea. But it works very well.

And actually for telecommuting, the studies show people who telecommute, work at home one day a week. The CIA even uses it, so there's no security problems and everything else. Really the productivity is actually higher. Twenty-five percent of AT&T's works, midlevel managers, telework one day a week.

And for retention and for recruitment to give people more choices over their own lives and different things like that, I really think you ought to be aggressively looking.

Do you have leave sharing?

Judge MECHAM. Yes we do.

Mr. WOLF. Do you know what leave sharing is? It was a bill that we put in. How often do you use leave sharing in the courts?

Judge MECHAM. With the AO, we use it fairly extensively. I'm signing forms all the time.

Mr. WOLF. I wonder about the different courts. Leave sharing is basically if you're dying of cancer, let's say, and you've run out of vacation time and sick leave but all the other people here, let's say we're all part of a company, we could donate a day of our vacation time.

Or let's say you had a major heart attack and you're not going to come back for a while and you've run out of vacation time and sick leave, we could donate a time. Ms. Allard's Dad was the chairman of the Committee at that time we put that in. Do you use that in the courts whereby if one of your people——

Judge HEYBURN. As far as I know, it would be permissible. Fortunately, we haven't had in our court an occasion to use that.

We have used actually now that I think of it, job sharing. We have a number of pro se law clerks who work on a lot of habeas cases and prisoner petitions for us. And there are a lot of, and I might say particularly women in the legal market out there, who want to be with their families and who are out of the traditional

track, and we actually at one time we had three part-time pro se law clerks or maybe even four as opposed to two part-time people. Now we have two half-time people who are occupying one position and then a full-time position. So we certainly make, you know, use that kind of a, if you will, a job sharing.

Judge PIERSOL. Because of the flexibility, frankly, the judges have with regard to their personal staff, law clerks and so on, just to tell you anecdotally, I hired a partner away from my former firm almost solely because I could provide flexibility for her and her childcare situation.

She is a pro se clerk and works part-time and is a wonderful employee that I couldn't dream of hiring any other way. But it's because of the flexibility that we have that I can do it.

Mr. WOLF. Well maybe you could survey and see what courts. It is a great retention tool. Flex time, flex place, job sharing, leave sharing in the judiciary again. Obviously people in the judiciary get sick as well as people in the Executive branch get sick. And the on-site childcare.

Some of those family-friendly policies that enable people to sometimes say, okay, as your partner maybe, I will maybe take a little bit less because this gives me more control over my own life to deal with my family and to deal with those.

[The information follows:]

The Judicial Conference has established policies authorizing the courts and probation and pretrial services offices to offer employees a wide-range of work place benefits. However, the differing sizes and operations of individual court units limit the practicality of certain work-place programs in some locations. As such, the court units have wide latitude to individually determine what programs will be offered to their employees. Even so, as the chart below demonstrates, a recent survey has indicated that a majority of units do provide work place benefits.

Work Place Program	Percentage of Responding Court Units Participating
Flex-Time	74%
Alternative Work Schedule	32%
Compensatory Time	78%
Voluntary Leave-Sharing	84%
Job-Sharing	19%[1]
Telecommuting	21%
On Site Fitness Centers	48%

[1] Percentage with formal job sharing arrangements. Each unit has broad authority to offer part-time employment for most job categories without entering into a formal job sharing arrangement.

In addition, the judiciary also recognizes the connection between employee recruitment and retention and the benefits offered by an employer. As such, at its March 1999 session, the Judicial Conference of the United States approved the following judiciary benefits philosophy statement:

> A goal of the judiciary is to be a model employer so it may attract and retain well qualified employees. The judiciary's employee benefits program is an important tool in attracting and retaining these employees. Therefore, the judiciary's benefits program will be one that is responsive to the reasonable needs of employees, is competitive in the marketplace, and is fiscally responsible.

Pursuant to this philosophy, the judiciary has adopted a number of supplemental employee benefits programs to improve recruitment and retention:

Premium Payment Plan - Allows employees to pay FEHB premiums on a pre-tax basis, effectively reducing the cost of these premiums. Approximately 95% of judiciary employees participated in this program during 2000 and 2001.

Flexible Spending Accounts - Allows employees to set aside salary on a pre-tax basis in special accounts that can be used to fund health care (including medical, dental, and vision) and dependent care (including childcare) expenses. Judiciary employees are given the option to set

aside an amount for either or both accounts. In calendar year 2000 (the first year of the program's operation) 24% of the judiciary workforce participated in the reimbursement accounts. In 2001 the participation level rose to 27%.

Commuter Benefit Program - This program which began operation in 2001, allow employees to set aside salary on a pre-tax basis in special accounts that can be used to fund mass transit and parking expenses incurred in commuting to work.

Long-Term Care Insurance Program - Offers group long-term care insurance on an employee-pay-all basis. Since the first open season in 1999, approximately 10% of the workforce has enrolled. This exceeds the industry average of approximately 6%. In addition, nearly 1,000 spouses and relatives of employees are enrolled in this program. A second open season concluded in April 2001 increasing our participation rate to 16%.

This program offers comprehensive long-term care insurance to judiciary employees at group rates. During open seasons, employees may enroll on a "guaranteed issue" basis. The judiciary program offers a range of daily long-term care benefits designed to accommodate the anticipated needs and the budgets of the greatest number of employees.

The judiciary has been, and plans to stay, at the forefront of government agencies in terms of the benefits it offers to its employees. A benefits program office has been established within the Administrative Office of the U.S. Courts to examine what benefits the judiciary can provide to its employees and the feasibility of seeking new legislation when necessary to expand the judiciary's benefit offerings.

Judge PIERSOL. She took a lot less. [Laughter.]

Mr. WOLF. Well, you know, I understand that. But if every Member here who sat around left this place, they could go downtown and they could make a lot of money. I was downtown. I was a lobbyist before I got elected to Congress. I never want to go back downtown. I've been here for 20 years. I would not trade this job. The opportunity to make an impact, to make a difference, to see something on 60 Minutes on Sunday night and come in here and do something about it.

So all the money that's, quote, "downtown", really, you know, life is—there's a beginning and there's an ending. But public service is important. It has a value beyond. I know we have to pay people fairly. I've always been a champion with regard to federal employees. But there is a whole sense of service that goes beyond just making money.

And I think sometimes we stress—and again, I take a backseat to no one on support for federal employees and judges and salaries—no one. Mr. Hoyer and I have always been out in front.

But on the other hand, we sometimes sell it too short. The opportunity for a person to serve in the judiciary compared to just being a big partner in a big firm downtown, so service is very important.

A young clerk who comes in and works for the Justice Department, works on a case that if he were in a law firm downtown he would never get to touch. His name would never be on it. Now he is the person or she is the person.

So I think public service has a certain reward.

Judge HEYBURN. And I think to a person, people in the federal judiciary would agree with that.

Mr. WOLF. I'm sure.

Judge PIERSOL. Or we wouldn't be here.

Mr. WOLF. I'm sure. I'm sure. On page 9, Mr. Mecham, of your testimony, you said, while the judiciary faces the prospect of using 40 percent of its employees to retirement over the next five years, in order to address this problem, AO has implemented several programs. For example, flexible benefits. Recognizing these innovative new programs, the Congress is now considering or has approved some of these benefits for the Executive Branch. For example, Executive Branch employees are authorized to pay for health insurance premiums on a pre-tax basis.

Can you not use that also?

Judge MECHAM. We have done. And we initiated it before the Executive Branch got into it. We are doing it. We're in our second year. And by the way, I met with the Speaker soon after that and told him, among other things, what we were doing, and he was quite interested in it, thought maybe it could be adapted and used by the House, sort of a pre-tax benefit program.

Mr. WOLF. Well, the Executive Branch has used it. The private sector uses it. And so you are using it?

Judge MECHAM. The Executive Branch for a long time did not. I think they've just initiated a program starting October 1st so they can use pre-tax income.

Mr. WOLF. Now we're looking at legislation to allow some private sector companies are saying that you can take let's say $5,000 pre-tax and begin to pay your childcare and other things out. We're

working on legislation for the Executive Branch with regard to that. Would that not help you?

Judge MECHAM. I wish you would add the judiciary to it, then, because currently we don't have authority to do that or the funding to it for that matter.

And although if it's pre-tax, perhaps we could if IRS is willing to let us do it.

Mr. WOLF. Maybe you can stay in touch. We're meeting with OPM on the issue. We think maybe they have the authority now to do it and just aren't doing it. But if they don't we're going to put in a piece of legislation. And we will add the Judicial Branch in.

But that would be a great recruitment tool I would think, would it not? For retention.

Judge MECHAM. It would. In fact, my staffer ably reminded me that we do have—we are doing it now for childcare and healthcare. I had forgotten about that.

Mr. WOLF. Is that the $5,000? You are doing it. So you're actually ahead of the Executive Branch.

Judge MECHAM. We were. And that's one of the reasons we suggested to the Speaker that you might like to use it in Congress, too.

And we also have a long-term care program, which is employee pay all, and as I remember, it's not pre-taxed. But you can get a better rate as a group. And so we've initiated that in the judiciary, too, again before the Executive Branch did.

Mr. WOLF. Good. Okay, well, stay in touch and we'll make sure——

Judge MECHAM. We'd like to work with you on that.

Mr. WOLF. Okay. A couple other questions. I would hope that this Committee, or I'm going to certainly try to convince the Executive Branch and the Bureau of Prisons and the Attorney General to set up a faith-based prison or a faith-based prison wing whereby at the day of sentencing before the judge, there is an opportunity, let's say Petersburg prison, you want to go to Wing A, which is faith-based, or Wing B or C or D or E or F or G or H that are not. You may be of any denomination of any religion or whatever.

But my sense is the faith-based programs the people are there and the opportunity to be in a wing whereby whether you be Muslim or whether you be Christian or whatever the case may be.

Now I know you're the judiciary and you're not going to get involved in setting up a faith-based prison. But are there any complications that you see with regard to, at sentencing time, if it's purely the will of the prisoner as to where he or she is sentenced, whether it be Wing A, which is faith-based, versus Wing B, C, D and E which are not?

Judge HEYBURN. Typically, the federal judges, we sentence to a period of time. We distinguish between whether we're sentencing to a federal penitentiary or whether we're sentencing to a period of release or probation.

But then under the statute actually, we can make recommendations as to where and under what circumstances. But it's the Bureau of Prisons that determines the prison and the wing within the prison and the program, whether it's a drug program or some kind of boot camp program based on all kinds of criteria that they use.

They determine where that particular inmate would be best, hopefully, what would be best for that inmate. So we don't get involved.

Now when we're considering how to sentence someone, oftentimes we'll have a dialogue with the Probation Office. You know, what kind of supervised release is available? What kind of work release is available? And that will go into our cognitive process when we're determining whether or not we should sentence to a time incarceration or whether supervised release or probation, whether there's a program available.

And I think if you surveyed the country, you would find that there are, I'm sure, I know in my community there are, some faith-based or affiliated organizations that are providing various services.

Mr. WOLF. Well, this is different, though. I was involved in a program down at Lorton Reformatory before I was elected. It was a faith-based program. But the warden didn't, you know, you could come in certain times. I'm talking about faith-based. Because you cannot put a man away for 15 years and give him no rehabilitation, no training, nothing, and all of a sudden expect him not to come out and be involved in another crime.

And much of this is at the state level, but Lorton was a federal prison. The resistance was very great, particularly initially. So I know you have chaplains and you have all those things. I'm talking about a faith-based wing, and the men or women in this wing, is it a faith-based prison?

Now you know we have a tremendous crime problem. I agreed with what Mr. Kennedy said. You just can't put a man away and just say okay, we're going to lock him up and throw the key away. If there's not rehabilitation, if there isn't—you know, they're going to come back. And the recidivism rate.

I'd like to see some grant programs whereby I'd like to see my state, the State of Virginia, to take the lead on a federal grant to say, okay, we're going to take one of our prisons and turn it into a faith-based prison whether they be—and obviously it's not going to be the Presbyterian Church running the prison, but it will be the different denominations—Catholic, Protestant, Jewish, Muslim—can come in and work together and so that men are learning together in that prison.

My sense is too the violence that you don't find as much in federal prison, but the violence that you find in state prisons and all could be reduced.

At the time—I'm inferring from your statement, at the time of sentencing that could be something that would be considered by a judge with regard to sentencing of a person if it was purely optional, meaning they had the choice of whether they wanted to go to a non-faith-based or a faith-based.

Judge HEYBURN. Let me just comment, and then I'll let Judge Piersol. The only cautionary tone I would set is that as it now stands, you know, we are not the experts on what is available in a particular facility, how crowded a particular facility is.

So when you put the judge in charge of where someone goes, you're really putting us——

Mr. WOLF. I'm not talking about putting you in charge. I'm asking do you see a problem at the time? If the judicial system doesn't

want to be involved and if the parole officers. But there are cases in local courts where the judge makes some of those decisions.

Is there a problem of having something like that in existence so that when a man or woman stands before and has to make a choice of having an option to go to a faith-based institution or a wing versus a non-faith-based?

Judge HEYBURN. I'm sure there are lots of policy and legal and other considerations. I guess I don't really feel qualified to—I think someone from the Bureau of Prisons would be the best person to answer what problems if any. There may not be any problems. I really don't know.

Mr. KENNEDY. Mr. Chairman, if I could interject. But what kind of assessment is done on these peoples' mental health?

Mr. WOLF. Quite an extensive. I mean, if you have—Judge Piersol and I were just talking. If you have a mental or physical problem and you're an indigent and you happen to be charged with a crime in the federal system, you may have the best situation you could possibly have.

Because they're typically sent off to a federal medical facility and as far as I can tell, you know, when I see the product coming back, it's a tremendous workup. And these people get better care than they've ever gotten before. And sometimes, you know, we can tell, anyway, that somebody's been able to identify what their problem is and to deal with it in some way.

Mr. KENNEDY. You would also agree that there's been a major problem in our state prison system with a lot of people who have mental illness being incarcerated that were released years ago through the deinstitutionalization.

Judge HEYBURN. I'm sure that's true. I read newspaper reports like you. You know, when I testify here about the federal system, I can testify based on some assurance and knowledge. And of course we get cases filed by inmates from state facilities. And it's my general impression that the federal facilities provide a lot better services than the state facilities do. But that's an impression based on cases and evidence that I've seen.

Mr. WOLF. Judge Piersol, did you have something you wanted to?

Judge PIERSOL. No. I was going to make a comment with regard to the faith-based. A little bit more detail which you might like to know. When you're sentencing, and like last year I sentenced maybe 180 people, but when you're sentencing, for example, when we have boot camp. Well, if somebody is eligible for boot camp or you think they are, at least I commonly if I think that they're somebody that would go for it, I'll ask them if they want to request boot camp and make it clear that their request isn't binding nor is my recommendation binding. But I make such a request, and sometimes their lawyer hasn't talked to them about it ahead of time, so they whisper to each other for a little bit about what's boot camp. But usually they've been keyed on that and they know one way or the other.

If I make a recommendation one way or the other, then I'll make the recommendation. And at least in—I'm in the Eighth Circuit, which is in the Midwest. Then once I've made a recommendation whether it's boot camp or something else, always, at least where I am, when there's a recommendation made, if the prison under

their regulations and so on feels they cannot accommodate that recommendation, maybe—there are six different levels of security for a prisoner. And maybe this prisoner can't get whatever it is I have suggested because of their security level or any number of things, they'll always write a letter back saying we always consider your recommendations. I'm sorry we cannot accommodate it for this reason or that reason. Or they write back and say we were able to.

That's as a practical matter how it works, just to give you a little more background with regard I think to your question, maybe by analogy, as to what might happen.

Mr. WOLF. Well, that's a good answer. You know, I respect the men and women who are judges. I think you develop an intuition that you're sitting there on the bench and you see some person standing before you.

And you just—and Judge Heyburn. This guy has a family and what are we going to do? And you're going to go home and say to your wife, you know what I did today? I sent this guy away who I just, you know.

And some of the state prisons, the raping of men, the conditions. I've been in prisons in the State of Pennsylvania during this period of time which has certainly influenced my feeling and also gone down to Lorton. Lorton is a federal prison. Believe me, you would not have wanted to be in Lorton Reformatory. The men who were in the dormitories. They were telling me, you know, I never go to sleep at night because I'm afraid if I fall asleep, someone is liable to put a shiv in me.

You go into the rec room and there's no strings on the instruments. At one time not very long ago I walked down there and broke away from the crowd and I walked into a drug rehab room. There was a television on. The room was very, very dark and there were cartoons on. And the men were sort of just kind of laying on their benches like you used to do when you were in school. You remember the time you put your head on the bench. I mean, that was a federal prison.

The rehabilitation is zero, zip, none.

We put a man down there for 12 years. No rehab, no nothing.

Now they may come up and tell you there was rehabilitation, but I saw firsthand. Then, you don't expect that man to get out of the prison and to bump into you at 20th & K, and all of a sudden you wonder why he is back.

The recidivism rate at Lorton, which was a federal prison—maybe we can check and put it in the record at this time—was probably, I would say, above 75 percent or maybe even 80 or 85.

I believe—and I am going to just ask you one more question and give some more time to others—I believe in being tough.

But, I also believe in being fair, and I think, when somebody is arrested and goes to jail, there needs to be rehabilitation.

We have another idea that we are working on with regard to prisons, which we are going to try, about doing something with regard to work in prisons.

Most men in prison do not work. Most men. In fact, I have been in federal prison where they are——

I mean, they are working, but they are really not working. They are in a laundry room, and, you know, they are really not working.

So, there is no practical rehabilitation, and I don't think that the Congress or the judiciary can be punched apart and say, well, we did our jobs and now they are off to the Bureau of Prisons.

I think we have to do everything we can with—when being tough but with dignity.

I believe very strongly that we at least have to try, for a period of time, a faith-based operation and comparing the two, so that, at the end of five, six, seven years, we now know does it work.

Yeah, it really does work. There has been a change. Why? This man or woman is not coming back.

So, hopefully, we can do that, and I am going to press the Bureau of Prisons. We are going to push it.

I am going to press my state to do it, because you just cannot, and anyone who thinks you can they should go into the prisons, not just for an hour walking tour but just go in and spend some days.

The program that I was in, we went down there one day a month.

It is a program called Man to Man, and just go into the prisons, go into the visiting rooms, and go and see the environment and talk to the people.

Then, after you talk to them, listen to them. We have got a long way to go.

I think the judiciary needs to develop an intuition that I couldn't even understand, and hopefully you can participate or help us develop this in a way that has the constitutional guidelines and all these things, whereby we can give people an opportunity with dignity to change, so there really is, as Patrick was talking about, rehabilitation where there would be mental health and these different things.

Mr. KENNEDY. Mr Chairman, I ought to follow up with that and just say I do think that, in the Bureau of Federal Prisons, there is a lot to be desired in terms of the kind of programs that these prisoners are in.

I have been to a couple of federal prisons, and I mean it is just make-work all day long.

This is the system that they are working with—operating out of fear.

It is a punitive approach. There is no such thing as trying to communicate.

I think the training of the correctional officers has a lot to do with it, because they have very inadequate training in terms of dealing with these prisoners, it seems to me.

You are pointing to that issue of whether you have got programs on paper or programs that are actually working in the prisons.

Right now there are many programs on paper, but I concur with you my experience of going to these federal prisons.

I have been to one in the last couple of months. It is a sham. It is absolutely a disgrace.

I mean, we are creating this whole prison underclass. All these folks that are in prison today are going to get out someday.

We are going to be in real tough shape if we don't do a better job at the rehabilitation aspect of it, so I concur with you.

Mr. WOLF. Thank you. The last issue, and I will come back, is, on the issue of sexual trafficking, how many cases do you see?

Now, there have been 50,000 women a year, we have been led to believe, are now coming to the United States for prostitution and exploitation.

The Congress last year passed a Sexual Trafficking Bill.

How many of these cases are showing up now in the U.S. courts? That is now a federal crime.

If you don't have it at your fingertips and you want to just submit it for the record——

Mr. HEYBURN. I am not sure we could. We keep pretty accurate statistics, and we could get you that number.

I have not seen anything in Kentucky yet, but we can get you that number.

Mr. PIERSOL. I don't have the cases in South Dakota, either. Our's are child and sexual abuse that we have.

Mr. WOLF. Mr. Mecham, do you know?

Mr. MECHAM. I don't have the data, but we will be glad to try to get it for you.

Mr. WOLF. Okay, now, the FBI is cracking down on that, and we ought to be seeing a significant——

These are women who are brought from the Ukraine and Russia and Romania, and places like that, who are coming into the United States for prostitution and basically are slaves, passports taken away from them.

Since the law enforcement will be cracking down, I think the judiciary ought to be prepared.

In the sentencing guidelines that I went through last night, there is a segment dealing with that.

So, if you could just submit for us the information on a human trafficking.

In response to an emergency directive contained in the victims of traffic in the Violence Protection Act 2000, the Commission voted to amend the guidelines applicable to P&H and voluntary servitude slave-trade offenses and possession, transfer and sale of false immigration documents in furtherance of such trafficking in the Fair Labor Standards Act and the Migrant and Seasonal Agriculture Work Protection to reflect the heinous nature of these offenses.

The amendment accounts for new offenses and increased statutory maximum created by the Act.

So, if you could tell us how many cases and maybe in what Districts that you are seeing the trend, because my sense is that the FBI does do what it is supposed to do, crack down on this, you will begin to see a tremendous——

[The information follows:]

Because of the relatively recent enactment of the Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106–386), the judiciary does not have any record of cases being brought under the statutes created by this Act (primarily, 18 U.S.C. § 1589). According to the Department of Justice, the first indictments are just now being granted against defendants who were arrested and are being prosecuted under violations of this Act. The judiciary has, however, seen increases in recent years in similar types of cases. For example, in cases brought under 18 U.S.C. §§ 2421–2427, Transportation for Illegal Sexual Activity and Related Crimes, there has been more than a three-fold increase since FY 1996 with cases increasing from 40 in FY 1996 to nearly 150 in FY 2000. Based on the first half of 2001, the number of cases brought under these statutes is continuing to rise.

Mr. HEYBURN. I might point out that is one of the——

Now that the Sentencing Commission is fully funded and fully constituted, they can do the work like this that they were supposed to do, and that is respond to new statutes and new circumstances of crime, unfortunately, that develop.

Ms. SMITH. This is an anecdotal bit of information.

Shortly before I left San Francisco, I had one of those cases.

It involved three young women whose ages seemed to change depending upon the hearing and who was testifying.

I would get ages placed on them anywhere from 15 to 17 to 19 to 21.

It was a terribly difficult case for the U.S. Attorney to prosecute, because the young women were not willing to cooperate. They were terrified.

Mr. WOLF. They were fearful.

Ms. SMITH. Their mother was still in Southeast Asia.

Apparently, there was some concern over her safety. There was an offer made to bring the mother to the United States to be with the girls.

You know, it was just very, very difficult. They didn't speak English.

They felt completely lost and alienated. They didn't really trust anybody—not our government or Asians or anybody else.

So, I agree with you. I think this is one of the real atrocities going on in the world today.

I think we will see more of them, but I think we also need to be prepared for the fact that there are going to be difficult cases because of this fear element and a fear of cooperating on the part of the victims themselves.

Mr. WOLF. You are right, and the reason I referred back to the involvement of justices in these, many are coming through Albania, coming through the Ukraine coming there.

I think the more you can have your people talking to the judicial system there so they know how this is viewed, also the question what do you do when women who are being exploited by very wealthy people——

Now, where did they live when they were—before the court? Were they in jail?

Ms. SMITH. Well, that was one of the problems, because one of them was reportedly 15, there was an issue.

We couldn't put her, you know, in any of our facilities, because she was too young.

Mr. WOLF. Where was she put?

Ms. SMITH. She was put in the San Francisco juvenile home for awhile.

Mr. WOLF. Oh, boy.

Ms. SMITH. But that, I mean—You want to talk about Lorton.

You know, that was not a wonderful place, either, and so finally——

That was why they wanted the mother to come, because we said, if the mother would come, we would try to find a place, you know, for them to stay while all of this was sorted out.

Then, I left in the middle of that, and I am really not sure.

All they wanted to do was go home, as they saw home.

Mr. PIERSOL. Let me ask, if you are interested in that subject, another facet of it.

I happen to be where Gateway has some of its primary offices, so I see quite a little child pornography cases on the Internet.

I think, without exception, of the various defendants I had before me, that they don't understand how there is a victim, because the people who are being portrayed are usually prepubescent or really pubescent girls.

Of course, they are victims of another sort, because they are generally being exploited in a way.

But, the people that are the end users don't understand that they are being exploited.

So, that is another aspect of the same thing you are asking about, but those are handled under different statutes.

Mr. WOLF. Mr. Serrano?

Mr. SERRANO. Thank you, Mr. Chairman. Let me first just make a couple of comments before I ask my final question.

Let me say that I agree with you, Mr. Kennedy, and I know with Ms. Roybal-Allard. I don't think I have ever seen an institution that is really in the business of rehabilitation.

As a state assemblyman for 16 years, I visited many of the facilities and some of the things you see on TV in terms of how they depict the inside of prisons are actually mild compared to the reality.

This latest incident we had, which is related to the prison issue, obviously, was sentencing a child to life imprisonment without parole in Florida. I cannot contradict myself. Those of us who are against the death penalty know that the answer, perhaps, is life imprisonment.

But in this particular case I think the message sent is that the system is not in the business of rehabilitating anyone. It is in the business of sending you away forever without a chance of ever coming out, as in this particular case.

Secondly, let me say that, on the issue of faith-based prisons, again, I can't contradict myself. If I believe that we have to rehab, then we have to use whatever tool is available to rehab and, certainly, faith is a very strong tool.

But when you mentioned my second state, the State of Virginia, it brought to my attention, what is to my mind the biggest problem, the whole issue of faith and government and separation, and that it is not so much faith-based programs themselves but sometimes the people involved.

So when I think of Virginia, as I said, my second State, I think of two nationally known religious leaders who have TV shows and what involvement they would have in anything we did in Virginia.

And that, I bet you, would cause us more discord with people. I bet you if you asked people how many of you really believe that this is a bad idea by the President or anyone who proposed it before because there is a Constitutional question, you would get some people.

Then, if you really prod, you will find the majority may not be worried about the Constitutional question as much as who is going to write the prayer for prayer in school, who is going to determine what is going to happen in that prison wing, who is going to deter-

mine what is a real crime and not a crime, and who should get help and not, and that is a real issue.

So I am not out of tune with you on that one. I would just like the players to be carefully selected. [Laughter.]

Mr. WOLF. If the gentleman would yield just for a second?

Mr. SERRANO. Sure.

Mr. WOLF. The person who I think has done more for the issue of prison rehabilitation and dignity has been somebody who also is from my State, who has an operation not very far from where I live, and that is Chuck Colson.

Chuck Colson has probably done a better job of educating the public with regard to this issue and, I would add, a lot of confidence, although I am not speaking for Chuck Colson and I am not speaking for Prison Fellowship—and they did not know I was going to say this, and I did not know I was going to say it until you just raised that issue—I would have the greatest confidence in the world if Chuck Colson or somebody like that were to say, okay, we are going to go in and we are going to deal with this issue, and treat men with dignity.

I am a conservative Republican. There should be no doubt about that.

I believe in being tough. My father was a Philadelphia policeman, and I come from an inner-city neighborhood and believe in being tough on crime.

My faith tells me that when you put somebody in jail, you treat them with dignity and we rehabilitate and we bring them back, the whole message—and we don't want to get into theology here—is Grace. Grace means forgiveness, and you work him back out.

So if I am going to arrest somebody for 20 years, during that 20-year period, we want to—you know, that is why Chuck Colson does a great job on Angel Tree, because different people buy gifts for their kids while they are in prison, and then they do these things. So I think you can do it in a way, and I think we can do it.

Mr. SERRANO. I must say, Mr. Chairman, that if we had rehearsed sort of how to win you back, that would have been the name to mention. [Laughter.]

Because it so happens that my predecessor, Congressman Bobby Garcia, who saw some difficult times, is very much involved with Chuck Colson. He is the son of a South Bronx Pentecostal Minister, the Congressman is, and his sister, Amy, is a Chaplain at a couple of women's prisons in New York. So I know the kind of work they do when they go into a prison, and certain I would be supportive of that.

Mr. WOLF. Okay, thank you.

Mr. SERRANO. Now as far as my question, let me preface my comments by saying that Chairman Rogers and I had an ongoing oral relationship about the fact that I never missed an opportunity during a hearing, any hearing, to mention my opposition to the Cuban Embargo, and to—and I just did——[Laughter.]

Mr. SERRANO [continuing]. And to the relationship between Puerto Rico, my birthplace, and the U.S., I call the Territorial Badge, the Colonial relationship.

But it is not out of place in this committee because many of the agencies that come before us deal with the issue of promoting our Democracy, and so on.

And so my question to Ms. Smith is about the program in Puerto Rico. And then, I won't pass up the opportunity to say how ironic it is that we use Puerto Rico to promote our democracy and our judicial system to other people while for 103 years we still have not decided whether to let them be an independent nation or a 51st state of the Union.

But I just wanted you to tell me basically what goes on, and who comes, and how much does it cost us.

Judge SMITH. Okay. I do not think it costs us—certainly it does not cost the Center anything. And if I might have permission, I would like to ask Russell Wheeler, the Deputy Director who has been involved in the project himself because he has spent quite a bit of time in Puerto Rico helping them set up this training program, to just comment if that is all right.

Mr. WHEELER. Well as you know, Congressman Serrano, the Commonwealth and Courts in Puerto Rico function in Spanish, but they use Common Law procedures. That makes those courts probably the only place in the world where judges in Latin America where the codes are being changed from a written to an adversary system. They can observe that operate in Spanish.

So the Law School of the University of Puerto Rico for about ten years has been providing opportunities for Latin American judges to observe that process and to study adversary system.

More recently, the government there has created this InterAmerican Center for the Administration of Justice to regularize this process. And the Judicial Center has been providing them some technical advice and assistance about how to use distance education and structure the curriculum.

AID has provided a grant now to the center to bring groups of judges to Venezuela, which is one of the countries that is having its own problems and is right in the middle of this code transformation, to Puerto Rico over the next two years in classes of about 40 to go through this course.

And I think there is going to be interests in others. We are just getting it going now. Professor Roberto Opante of the Law School—maybe you know him—will be in town later today for a meeting at AID which we are going to try to get to.

Mr. SERRANO. Now, just very briefly, what is it that we—I mean if they had no courts, I know what we would teach them, to have a system like ours, but they do have a system that they are trying to make like ours.

What is it specifically, in a very brief moment, that we teach them?

Mr. WHEELER. If you want me to, what's called a Tribunal in Venezuela, you will see a room about this size with the judge and stenographers taking testimony from witnesses. And then the judge issues a ruling, and then the lawyers will come back with a response. But it is all written. There is no exposure in open court to witnesses, to the offering of testimony, and to the whole adversary process.

It is not just a technical change; it is a whole different mindset. So you need to see it happen. It is not enough to read about it. You can see it happen in Puerto Rico. But you can see it happen in Spanish.

Now the Code in Venezuela is different than the Criminal Procedure Code in Puerto Rico in its details, but it is not different in its basic design. It is the common law system that makes Puerto Rico, as you know, this unique institution that has one foot in the common law and one foot in the civil law system.

So that is what they see there. They see the common law procedure operate in a Hispanic sense in Spanish.

Mr. SERRANO. Yes, I can imagine, Mr. Chairman, where they would be seeing a system they would respect and want to imitate in a language they understand and would be able to apply back home.

Mr. WHEELER. That is the essence of it.

Mr. SERRANO. Thank you.

Mr. WOLF. Mr. Kennedy.

Mr. KENNEDY. Thank you.

To continue on the issue of the First Circuit Court of Appeals, which actually takes in Rhode Island as well as Puerto Rico, I was——

Mr. SERRANO. The Island States.

Mr. KENNEDY. Yes. [Laughter.]

We are both islands.

Chief Judge Terrera has talked about the security issue and mentioned about how the terrorism trial he had was really a major problem in terms of the security.

Would you comment on judges' security when it comes to many of these issues, their own personal security? Is that an issue here when you are talking about enhancing security for the court? It does not just mean within the court, but also the threats towards judges as well?

Judge HEYBURN. Well I think you have got to deal with it on several different levels. We are constantly reassessing the level of security that is provided to courthouses and to judges.

As a matter of fact, we have an independent consulting firm right now looking at the security that we provide, whether it is the right kind of security, whether it is enough security.

So we want to provide a level of security that is sufficient to individual judges and courthouses.

On an individual basis, in districts around the country, the United States Marshals look at particular security problems. When you have a trial that involves dangerous people, or that is getting a lot of notoriety, then I think at this point we are confident that on those occasions the Marshals Service is providing the kind of individual attention to security that is necessary.

We have federal judges around the country who are being guarded on occasion 24 hours a day where the situation warrants it. Thank goodness that is a very, very small minority of the federal judges.

But where that becomes necessary—and it does become necessary on occasion—then the U.S. Marshals Service is able to devote that kind of attention.

Judge MECHAM. You mentioned Chief Judge Terrera of the First Circuit, who by the way is one of your fellow Puerto Ricans and a great leader in the Judiciary, he with others on the executive committee talked with the Attorney General about this, as they had Ms. Reno before.

We really have a major shortage in manpower of the U.S. Marshals Service. They have done a study. They need 2000 more people. They went the other way. They actually lost 600 jobs. So there is not the kind of security that ought to be provided for judges and courts around this country because they do not have the manpower.

They are the orphans of the Justice Department. The glamour of people like the FBI and the U.S. Attorneys, and DEA, and all that stuff, they get the money. But the poor Marshals Service who claim that security of the courts is their number one objective, they do not get the money, and being number one is no honor for the Judiciary.

Mr. KENNEDY. Well I appreciate that, Mr. Director, and I thank you for your comments on that because I think we are going to look for the Marshals Service to get some more support for security for the reasons you have outlined.

I want to thank you, on an aside, for the work that you did with Judge Tores up in my State when it came to the Defenders, additional Defenders that we needed in the Defender Service in Rhode Island, the two attorneys for that. So I wanted to just thank you for your help back home. The feedback has been great in terms of their work with you, and I want to thank you for that.

Judge MECHAM. Well thank you.

Mr. SERRANO. Well, Mr. Chairman, if I may just for a second, you mentioned Judge Terrera. He was faced with an incredible situation where the Legislature in Puerto Rico voted to have an election this past November to vote for President, and then to send the votes over to Congress and say, "It is time for you to decide what to do with our votes. We are American citizens."

The Justice Department was forced to do something no justice department should ever be forced to do. They are usually defending our rights to vote. They had to go to court to say these people should not be allowed to vote.

And the court decided they shouldn't, but the Judge wrote about the right of people demanding this vote, but that we can't give it to them because it is not a popular vote, it is an electoral college vote. So that was chapter one of how the electoral college was going to do in a lot of people in this country, as we later found out. [Laughter.]

But it was an earlier decision than November he basically said they are right. They should vote. How can you deny 4 million Americans the right to vote for their President? He says, but the Constitution says it is the electoral college not the popular vote that counts.

Mr. KENNEDY. Well I think Judge Heyburn said something about that earlier when he said that, quoting Hamilton, the Judiciary was the least threatening. I think in this last election we learned that maybe that is otherwise. [Laughter.]

Judge HEYBURN. I will not touch that one. [Laughter.]

Mr. KENNEDY. The Supreme Court is coming in next week. [Laughter.]

Mr. SERRANO. Those comments are all that this side has left to say. [Laughter.]

Judge HEYBURN. As I said, the Supreme Court speaks for itself in all measures.

Mr. WOLF. And one of the best Justices from my Congressional District, Justice Marshall, out in Fauquier County. So in Virginia it is amazing the people who have come out of Virginia. There was Madison with the Constitution, and Marshall obviously with regard to the Supreme Court, and never, ever did a group of men at one time make an impact on the world from one State.

There was Washington, whose first elective office was from my Congressional District, not in Mt. Vernon but Winchester, Virginia, and he lost on the first time. But Marshall, and then Madison, and Jefferson, and Monroe. So it was a pretty incredible time.

Mr. KENNEDY. You forgot Mr. Wolf, too. [Laughter.]

Mr. WOLF. No, I am not in that category.

Mr. SERRANO. You can skip me.

Mr. WOLF. We are going to end. There are just two comments I have.

One, I think your comment on the Presidential Commission is a good idea with regard to the whole recruitment effort. When we have a new Office of Personnel Management Director we are going to ask them to deal with these issues in a very upfront way.

Maybe this is an opportunity for the Bush Administration to take the lead on recruitment and retention in the Federal Government. We want the Federal Government, whether it be the Judiciary or the Executive Branch, to be the very best. I think your idea makes a lot of sense of a Presidential Commission, almost like a Hoover Commission back in, I guess that was the last '40s or early '50s I think did that.

On the other issue, I think the courts are going to have to speak out a little bit, too, on the whole issue of the drug problem. We really do not have a war on drugs.

As Chairman of the Transportation Committee, we have beefed up the Coast Guard aggressively. I do not think the Coast Guard has ever fired on an airplane or a fast boat coming out of South America.

It is one o'clock in the morning. That fast boat is moving. They know what is on there. And they have never done it.

I think we have to be very much more aggressive with regard to enforcement. But on the other hand, we have to be much more compassionate with regard to rehabilitation.

I am sure most of you saw that movie Traffic, which I thought was a very good movie to sort of force us to focus. My sense is, speaking for myself, there ought to be much more aggressive enforcement at the border, and beyond the border, meaning going down into Columbia and places like that.

But on the other hand, we need great education, which we do not have. And Mrs. Roybal-Allard, who is not here, offered an amendment last year, which I supported, which failed in the Full Committee, that said that the Drug Czar, General McCaffery, could have taken some of that money and applied it to education on the

ads for 13-year-olders for drinking. The alcohol industry and the lobbyists were all into this place, and we were not even able to get enough votes to say that we should educate 13-year-olders not to drink.

Drinking at 13 is the gateway to drugs at 15. So education to keep people from moving in, and then rehabilitation, that if a person does get caught into the culture, to rehabilitate them to do everything we can so that we are not just warehousing people for 20 years, and different things like that.

So it is a three-legged stool. It is rough, tough enforcement, which the Coast Guard does not do. They do a great job of rescuing people, but they do not do it. They actually have a night goggle vision. They know who is coming in. They know where it is coming in from Mexico. They know all that, but nothing is done.

But more education and more rehabilitation for those who are caught in it. I think the Judiciary has to kind of speak out and be a voice on this issue, because you certainly have an understanding far better than maybe somebody that is in my job or somebody else.

And lastly, we will attempt to do what we can with regard to the budget, knowing that you stay in touch with the staff and us, but the numbers that we now are looking at look really bleak.

So we are going to try to do what we can to help you, but you have got to look at it based on the allocations that we are going to be getting. And the State Department has been increased dramatically, which I support.

And so as we put some of these up, others, there are winners and there are losers in this process. And so as we go through the process, it will be tough but we will try to do the best we can. And I appreciate your testimony.

And unless Mr. Serrano has a question, we will end.

Mr. SERRANO. No, just to once again agree with you. This is becoming a love fest, and I like it——

[Laughter.]

Mr. SERRANO [continuing]. But people watching this later on TV, or whatever, may say why were they getting that speech about what needs to be done.

Well, you are the ones. It is the Judiciary that is charged with the responsibility of sending someone away. And I can tell you, as one who grew up in the South Bronx, the line between being a quote/unquote "upstanding citizen" of the community, who can become a school teacher, a professional, get elected to Congress, and the line between being an inmate somewhere is a very, very, very thin line.

And some people will say, oh, no, that is not true. You are putting yourself down. No. It is true. It is a very thin line. And so many of my friends could have turned out another way if their first mistake had been treated differently, not as harshly as it was, number one.

And secondly, that they were bombarded by everything, everywhere they went, about how good it is to do drugs and drink and smoke and everything.

And, you know, a minister, talking about faith-based programs, goes out and says take billboards down that advertise to children,

he was the monster in the community because he was taking on these giants.

So maybe it is time to more and more focus in your profession and begin to say, you know, we do not like sending these folks in there. And there is a disproportionate number of people from certain communities going in, and there has to be a problem somewhere.

If we talk about it, maybe if we start hearing it from those who are charged with the responsibility, and who are respected, maybe you will have an impact.

Judge HEYBURN. Well as you know, there have been Federal judges who have spoken out quite strongly, as they believe it is appropriate, in newspaper articles, law journal articles. There have been senior Federal judges who have refused to hear drug cases for precisely that reason.

I think Federal judges as a whole believe in the potential of human individuals and the ability of people to change. And I think by a huge, overwhelming majority Federal judges would like to have as many options available in sentencing as they possibly can to use what you have referred to as hopefully some intuition that we have that we gain by experience to do what is best.

And sometimes that involves long sentences, and sometimes it does not. We are all trying to do the very best we can, and this has been a fascinating discussion, and we are asking for the resources to continue to do our job.

We look forward to working with you and accomplishing what I think we are all striving in many ways for in a single objective here.

Mr. WOLF. The hearing will be adjourned.

Thank you, very much.

Judge HEYBURN. Thank you.

Judge MECHAM. Thank you.

Judge PIERSOL. Thank you.

Judge SMITH. Thank you.

Questions for the Record

QUESTIONS SUBMITTED BY CONGRESSMAN SERRANO

QUESTION: Last year the judiciary's request for panel attorney rates was for $75 in-court, and $75 out-of-court, and the subcommittee partially granted that request. Have the new rates gone into effect yet? If not, how are you able to evaluate the need for further increases?

ANSWER: The $5 per hour panel attorney rate increase provided for in the Defender Services FY 2002 appropriation went into effect on April 1, 2001. However, even with the $5 increase in FY 2001, the $75 in-court/$55 out-of-court hourly rates result in an average hourly rate of $58 per case. This does not cover many attorneys' non-reimbursable overhead costs ($65 per hour according to data contained in the Altman Weil, Inc. 2000 Survey of Law Firm Economics). Therefore, even at the higher rates for 2001, many attorneys continue to lose money, as well as the opportunity cost of working for a retained client. Many experienced attorneys simply are not available to accept appointments, particularly in protracted and complex cases.

QUESTION: How was the figure of $113 an hour arrived at, and what is driving the need for this increase?

ANSWER: The CJA was amended in 1986 to authorize the Judicial Conference to set panel attorney hourly rates at $75, and to implement increases based upon annual federal pay schedule adjustments set forth in the CJA. When these pay adjustments are applied to the $75 rate from 1986 forward, aggregated they would produce a $113 rate for FY 2002.

Panel attorneys perform a vital, constitutionally mandated service without which the criminal justice system could not function. The current hourly rates are too low to recruit and retain a sufficient number of qualified counsel to accept Criminal Justice Act (CJA) appointments. Even if the judiciary did not have difficulty attracting qualified panel attorneys at the $75/$55 rates, increases would still be necessary to counteract the continuing impact of inflation. Congress' doubling of the panel attorney hourly rates to $60 in-court/$40 out-of-court in 1984, the first raise since 1970, did not keep pace with the greater than 150% increase in the cost of living during that 14-year period. In 1986, Congress revised the CJA to provide authority to raise the $60 in-court/$40 out-of-court rates to $75, and to implement annual pay increases consistent with those granted to federal employees. Thus, sixteen more years have now elapsed without an adequate raise being paid.

The approval of all 94 districts over a 10-year period to receive the $75 rate was based on individual applications by district courts that addressed law firm economics in the district and the status of the CJA panel. Chief Justice Rehnquist wrote that "[a]dequate pay for appointed counsel is important to ensure that a defendant's constitutional right to counsel is fulfilled." The $75 in-court/$55 out-of-court rates, which took effect in April, 2001 in most judicial districts, are, in 1986 dollars, the equivalent of $46 in-/$33 out-of-court, thus reflecting a reduction in compensation since the $60/$40 rates were enacted in 1984. The current hourly rates are also far below average hourly retained fees ($232 for equity partners/$156 for associates according to the 2000 Altman Weil study). Even at $113 per hour, CJA counsel, who provide representation guaranteed by our Constitution, are underpaid as compared to rates paid by federal agencies to private lawyers.

Reliance on *pro bono* representation places too great a financial burden on a small segment of the federal criminal bar. Due to the expertise in federal criminal law required by such factors as the Sentencing Guidelines and complex federal statutes, courts increasingly must rely on a small group of specialized practitioners to provide representation for CJA-eligible defendants. The burden on these attorneys is exacerbated by the fact that the average number of hours expended by attorneys per CJA appointment has grown substantially over the past 30 years.

QUESTION: Are there certain geographical areas or specific courts that continue to have difficulty recruiting qualified attorneys at the revised rates established for FY 2001?

ANSWER: The problem of recruiting qualified attorneys spans the country. There are many courts that cannot get experienced attorneys at the current hourly rates of compensation for some of their court-appointed cases. The 70 percent growth in the number of districts (from 46 to 78) served by federal defender organizations in the 1990s is, in part, attributable to problems with the quality of representation, yet the courts' reliance on panel attorney representation continues to increase because of the growth in the total number of cases. The degree of specialization required by federal criminal law has reduced the pool of available qualified attorneys, and many of those attorneys whose experience is needed in federal court can no longer afford to take cases.

In his *1999 Year-End Report of the Federal Judiciary*, Chief Justice William H. Rehnquist stated that "[i]nadequate compensation for panel attorneys is seriously hampering the ability of courts to recruit and retain panel attorneys to provide effective representation." In connection with the survey of chief judges described in our appropriations submission, a federal judge wrote to the Administrative Office about the problems in his district (Western District of North Carolina). The judge observed that "[w]hile there are a number of very fine attorneys on the Criminal Justice Act Panel list, there are also a large number who are barely constitutionally adequate." Another judge (District of Connecticut) stated that "[t]here are a substantial number of [panel attorneys] who are only minimally qualified because of the extremely low rates of pay."

Judge Robin Cauthron (OK-W), Chair of the Judicial Conference Committee on Defender Services, recently sought information from all federal defenders and CJA panel attorney representatives. Their responses indicated that significant problems are being caused by the attrition of qualified and experienced attorneys from the panel and courts being unable to replace attorneys leaving the panel with attorneys of sufficient qualifications and experience because of the inadequacy of the rates. Comments received are particularly reflective of the negative effect on the quality of representation and the financial hardship being caused by the low compensation rates:

- An attorney from the Tennessee with over 30 years of criminal law experience, who is not a member of the panel, stated that: "Frankly sometimes to learn who appointed co[-defendant's] counsel is can be depressing, because the outcome is never in doubt. For example, attorneys are appointed to case[s] with life penalties with less than 3 years experience. The proposed increase would hopefully insure a higher quality of representation to indigent defendants."

- An attorney from Illinois with over 30 years of criminal law experience, who is not a member of the panel, wrote that, "[u]ntil you increase the hourly rate dramatically you will provide little more to the client but a warm body that 'might' protect the record for appeal purposes."

- The panel attorney representative from the Eastern District of Kentucky, who has practiced criminal law for over 20 years, wrote that an excellent immigration attorney on the panel resigned after a three-week trial due to the low hourly rates. There were three other CJA attorneys representing co-defendants, including the panel attorney representative, and all but the panel attorney representative also resigned from the panel.

- The Federal Public Defender from the District of Minnesota, who is a former Assistant United States Attorney, indicated that the result of the low rates is that "the majority of the appointed cases go to attorneys who have little federal criminal law experience or no experience in criminal law at all. . . . Although it would be nice to think that the government is getting something for nothing, it clearly is not. First, judicial resources are wasted in trying cases that should not be tried. Prosecutor's resources are similarly wasted. In addition, clients are serving more time than they should. Finally, hours are wasted on pointless areas of litigation, which add up even under reduced rates."

- A panel attorney from the Northern District of Florida with over 20 years of criminal law experience noted that: "Many lawyers experienced in representing criminal defendants have decided not to participate in the panel for economic reasons. The panel then becomes, in large part, a place where new lawyers opt to practice. This is a dangerous consequence given the serious penalties that federal convictions entail."

- A panel attorney from the Western District of Washington with over 20 years of criminal law experience indicated that he is unable to provide his employees with health care or retirement benefits due to the low rates of pay. (Similar statements were received from panel attorneys in the Southern District of California.) He added that rents in downtown Seattle have skyrocketed in recent years, from $12 per square foot in 1988 in his building to approximately $36 today.

- The Federal Defender from the Eastern District of Wisconsin explained that one of the better panel attorneys who vigorously represented a CJA defendant in a RICO case had to sell his house to avoid bankruptcy because of the financial loss he suffered. The trial lasted 12 weeks, and the case was litigated for 2-1/2 years before trial.

- In the District of Massachusetts, it took the court four months to find an attorney willing to represent an imprisoned person indicted for a new federal racketeering charge. A panel attorney representing him on other charges stated in a February 3, 2001 *Boston Globe* article that "I think the time commitment and the financial restrictions are probably the two principal factors that are apparently causing attorneys to shy away from handling these complex cases."

QUESTION: What impact, if any, do panel attorney rates play in the Southwest Border crisis?

ANSWER: In his *1999 Year-End Report of the Federal Judiciary*, Chief Justice William H. Rehnquist stated that "[i]nadequate compensation for panel attorneys is seriously hampering the ability of courts to recruit and retain panel attorneys to provide effective representation." Due to the substantial growth in the number of cases assigned to Criminal Justice Act (CJA) private "panel" attorneys in the five southwest border districts, the national problems associated with the low hourly rates paid to panel attorneys have been exacerbated. Since 1994, the number of representations assigned to CJA panel attorneys in the southwest border districts has increased by approximately 90 percent (from 7,268 in 1994 to 13,836 in 2000).

In the southwest border districts, there are significant problems associated with qualified attorneys resigning from the panel, and the courts' inability to replace them with counsel of similar qualifications and experience. Panel attorneys are declining appointments not only in extended and complex matters, but in all types of cases due to the low hourly rates. This is the situation even though some court locations in the southwest border districts (including the entire Southern District of California, Phoenix and Tucson in the District of Arizona, and Las Cruces in the District of New Mexico) compensate CJA attorneys at $75 per hour for both in-court and out-of-court work. In the other southwest border court locations, as in most judicial districts, panel attorneys receive hourly rates of only $75 in-court/$55 out-of-court.

According to the Federal Public Defender in the District of New Mexico, judges constantly complain about the quality of the panel in Las Cruces. As lawyers there become more experienced and establish busy practices, they become less inclined to accept federal panel appointments. As a result, the active lawyers on the panel in Las Cruces - those accepting appointments - tend to be less experienced. Experienced attorneys who speak Spanish in Las Cruces can make better money in civil practice or doing retained state criminal work.

The Federal Public Defender from the Western District of Texas wrote that the attorneys "are dedicated and hardworking, but there is a limit to how much CJA work they can be asked to perform at rates that require them to heavily subsidize the federal criminal justice system."

In some of the smaller southwest border court locations, local bar associations are overwhelmed, requiring courts to appoint attorneys from distant cities, thereby incurring added travel costs. For example, in Del Rio, Texas, about 10 percent of the total CJA appointments are handled by panel attorneys outside of Del Rio. All of these cases require travel to Del Rio for court appearances and client consultation. Locations providing panel attorneys include San Antonio, which is over 150 miles away; Eagle Pass, which is over 50 miles away; Uvalde, which is 75 miles away; and Carrizo Springs, which is almost 100 miles away.

QUESTION: You are asking for funding to open two new Federal Defender Organizations (FDOs) in FY 2002. You currently have these defender organizations in 80 of the 94 judicial districts. How do you determine the need for additional FDOs? Is there a specified set of criteria used to determine whether an FDO makes sense for a particular district?

ANSWER: The Judicial Conference has endorsed the establishment of a FDO in all judicial districts, where feasible, and when requested by the district. The judiciary examines the following criteria in determining the need for a new FDO:

- **Quality of representation** - districts with a federal defender organization generally provide higher quality representation than do districts without one. Federal defenders are federal criminal law specialists who understand the intricacies of the sentencing process, receive regular training by the judiciary, and become experienced at working with other components of the criminal justice system. Federal defenders, by providing training and other services, also increase the quality of panel attorney representation.

- **Difficulty in recruiting qualified attorneys to serve on the panel and accept appointments** - due to the specialized nature of federal criminal law, the low hourly rates paid to court-appointed counsel, and the large growth in the CJA caseload in recent years, many courts experience difficulty obtaining qualified attorneys to accept appointments.

- **Administrative burden on the court in managing the court-appointed program** - FDOs relieve the court of much of the administrative burden and costs associated with the CJA program (e.g., case-by-case appointment of panel attorneys; a judge's review of compensation and expense vouchers; and voucher processing and payment).

- **Cost per case** - if a federal defender organization is projected to be more costly than panel attorney representation, the judiciary considers whether the factors discussed above as applied to a specific district outweigh the increased cost. For these and other reasons, since 1990, the number of federal judicial districts served by FDOs increased 74%, from 46 to 80 districts.

QUESTION: To what extent is the need for additional Federal Defender Organizations impacted by the rates paid to panel attorneys?

ANSWER: The driving force in the 74 percent growth since 1990 in the number of districts served by federal defender organizations (from 46 to 80 districts) was the concern of district courts with the quality of representation. The degree of specialization required by the Sentencing Guidelines and complex federal criminal statutes has reduced the pool of available qualified attorneys. The low hourly rates paid to Criminal Justice Act (CJA) private "panel" attorneys has had a direct, negative impact on the ability of courts to recruit and retain qualified and experienced attorneys for CJA appointments. Many of those attorneys whose expertise is needed in federal court are not available to accept appointments or lose money if they do accept appointments, particularly in protracted and complex cases, because the current hourly rates of $75 in-court/$55 out-of-court paid in most judicial districts often do not even cover overhead costs ($65 per hour according to data contained in the Altman Weil, Inc. 2000 Survey of Law Firm Economics).

Even with the large growth in the number of districts that have established federal defender organizations in the 1990s to improve the quality of representation, the courts' reliance on panel attorneys continues to increase because of the rise in the total number of cases. (In districts with federal defender organizations, panel attorneys typically receive approximately 25 percent of the representations due to conflicts of interest considerations.) The request for a $113 rate is intended to provide a fair compensation rate for panel attorneys and to enable courts to retain qualified and experienced attorneys on the panel, and to recruit more attorneys with the requisite knowledge and skills.

QUESTION: How is the Judiciary impacted by the bankruptcy fee changes included in the Bankruptcy Reform legislation?

ANSWER: Both the House and Senate versions of the bankruptcy reform bill (HR 333 and S 420) revise the filing fees in chapter 7 and 13 cases and also change the distribution of the fees between the U.S. Trustees Office and the federal judiciary. The net effect of these two changes on the judiciary is a reduction by approximately $25 million over five years of the revenue that would be allocated to the judiciary under current law. This last fee revenue will require an offsetting increase in appropriated funds just to maintain current staffing levels.

Compounding this reduction are provisions in the bill that increase the judiciary's workload by requiring the courts and the Administrative Office to compile and report financial data of consumer debtors and maintain federal tax returns. The costs of implementing these provisions is expected to cost the judiciary $39 million over five years. These new responsibilities will also require additional appropriated funds to implement.

QUESTION: Does the Judicial Conference have a position on the various versions of the bankruptcy legislation being considered at this time?

ANSWER: The Judicial Conference has expressed strong concern with the current legislation because it effectively increases the judiciary's workload while at the same time reducing funding. The Judicial Conference has taken a position opposing the fee redistribution as well as provisions in the bill requiring the collection and reporting of financial data and the maintenance of tax returns.

The Conference does support the provision contained in both versions of the bill that provides additional bankruptcy judgeships (23 new judgeships in the House version, 27 in the Senate version). The Conference also supports the provision in the Senate version which allows appeals directly to the court of appeals when it is in the interest of justice, and certified by the district court or the bankruptcy appellate panel. The Conference opposes the provision in the House bill that would allow for appeals directly to the court of appeals upon consent of all parties.

QUESTION: While the Administrative Office received a $3 million increase in FY 2001, the AO budget has been held relatively flat over the past few years. What has been the impact of these funding levels on both the AO operation and the overall management of the resources of the Judiciary?

ANSWER: The $3 million increase appropriated for FY 2001 for the AO represents an increase of approximately six percent. This amount provides for current services including only pay and

benefits increases and inflationary adjustments. Since 1995, the AO's appropriation has increased approximately 23 percent, or less than 4 percent per year, and funded staffing levels have declined by 30 FTE. During the same period, funding for the federal courts has increased 44 percent and staffing has risen 14 percent, primarily as a result of workload increases. AO workload in support of the courts, however, continues to increase as well. In fact, since 1980 the ratio of AO-to-court staff has declined from 1 AO staff person to every 28 court employees, to 1 AO staff person to every 37 court employees. Many critical functions of the AO are supported with bare minimum staffing, in some cases by only one or two positions. Examples of essential AO functions supported by only one or two positions include staff support to committees of the Judicial Conference, project management of court automated systems, court reporting and interpreting program management, and probation and pretrial services program management (i.e., substance abuse and mental health treatment, home confinement/electronic monitoring, officer safety and firearms, and pretrial alternatives to detention).

Of primary concern is the AO's limited ability to provide comprehensive support to areas such as administration of law enforcement initiatives and program reviews and evaluations of court operations. These initiatives, reviews and evaluations are critical to the continuation of the judiciary's economy and efficiency efforts. For example, a recent study identified the critical need for more reviews and assessments by AO staff focusing on probation and pretrial services.

Over the last few years the AO has focused on economy and efficiency efforts and implementation of new automation systems in the courts, while other key court support, program management, and court reviews are thinly staffed. In addition to the court reviews, there is a need to conduct on-site court visits for the purpose of mutual court education, such as review and sharing of best practices and technical innovation. The limited staffing within the AO restricts our ability to be actively involved with identifying the needs and interests of the courts and opportunities for additional court management improvements. At the current funding level, the AO would have to reduce critical automation and efficiency initiatives in order to conduct analyses on the vast quantity of information available about each of the courts to identify trends and provide standards.

In the law enforcement arena, the number of persons under supervision of probation and pretrial services officers, projected to be 137,200 in FY 2001, is expected to continue to increase in FY 2002 and future years. Addressing the need for greater supervision, the AO is assisting probation and pretrial services offices in exploring the use of remote supervision technologies to improve monitoring of defendants and offenders. These include technologies to detect alcohol use remotely, automated telephone systems to verify an offender's location, global positioning satellite technologies to provide real-time continuous tracking of offenders, and mobile computing. Remote supervision technologies automate certain routine supervision tasks which will free officer time for other supervision activities and allow probation and pretrial services offices to manage their growing workload. Additional staffing for oversight of law enforcement initiatives would improve supervision of defendants and offenders in the community.

Efficiencies also may be available through the use of video conferencing technologies for judges who consult with one another on administrative business matters (policies about automation, personnel, resources, etc.) and non-oral argument calendar issues. Once again, staffing levels within the AO limit a full analysis of all judges' requirements and the implementation of appropriate solutions.

QUESTION: Please provide for the record a table showing the Judicial Conference's requests for additional judges -- by circuit and district -- since FY 1991, and the number of judgeships actually provided by Congress, including those provided via the appropriations bills. Please include in the table your most recent recommendation for 54 additional judgeships.

Additional Article III Judgeships Recommended and Approved

	1992		1994		1997		1999		2000		2001	
	R	A	R	A	R	A	R	A*	R	A**	R	A***
FIRST CIRCUIT												
Court of Appeals	1		1		1		1				1	
SECOND CIRCUIT									1			
Court of Appeals			1		2		2				1	
Connecticut	1								2			
New York, Northern					1		1				2	
New York, Eastern	2		3		3		3		1			
New York, Western	1		1		1		1		3		1	
THIRD CIRCUIT									1		3	
Pennsylvania, Eastern	1										1	
Virgin Islands	1											
FOURTH CIRCUIT												
Maryland							1					
North Carolina, Western	1		1		2		2					
South Carolina	1		1		1		1		2		2	
Virginia, Eastern					1		2		1	1		
FIFTH CIRCUIT									2	1	1	
Court of Appeals	1		1		1							
Louisiana, Middle	1		1		1							
Texas, Northern			1		1		1					
Texas, Eastern							1					
Texas, Southern			1		1		2		1		1	
Texas, Western							2		2	1	1	
SIXTH CIRCUIT									4	1	3	
Court of Appeals	4		4		4		3					
Kentucky, Eastern					1		1		2		2	
Kentucky, Western	1								1	1		
Ohio, Northern	1											
Ohio, Southern							1					
Tennessee, Eastern			1		1		1					
SEVENTH CIRCUIT												
Indiana, Southern					1		1					
Wisconsin, Eastern									1		1	
EIGHTH CIRCUIT										1		
Arkansas, Eastern							1					
Minnesota							1					
Missouri, Western							1					
NINTH CIRCUIT												
Court of Appeals			10		9		5					
Arizona	1		2		2		6	3	5		5	
California, Northern							1		5	1	4	
California, Eastern					2		2		1		1	
California, Central									2		2	
California, Southern			2		2		4		2		2	
Hawaii							1		8		8	
Nevada			2		2		3	2	1	1		
Oregon	1				1		1					
Washington, Eastern	1								1		1	
Washington, Western					1		1					
TENTH CIRCUIT									1		1	
Court of Appeals	3		3									
Colorado			1		2		2					
New Mexico			1		2		2		2		2	
ELEVENTH CIRCUIT									3	1	2	
Alabama, Northern							2					
Alabama, Middle	1		1		1		1		2		2	
Alabama, Southern							1		1		1	
Florida, Middle	1		4		4		5	4	1		1	
Florida, Southern					2		2		2		2	
Total	25	0	43	0	53	0	69	9	2	1	1	
Sub-Total, Courts of Appeals	9	0	20	0	17	0	11	0	63	10	54	0
Sub-Total, District Courts	16	0	23	0	36	0	58	9	10	0	10	0
Southwest Border Districts	1	0	6	0	7	0	16	3	53	10	44	0
									22	4	18	0

R=Recommended by the Judicial Conference. A=Approved by Congress.
*P.L. 106-113, The Judiciary Appropriations Act of 2000.
** P.L. 106-553, The Judiciary Appropriations Act of 2001.
***As of April 2001.

QUESTIONS SUBMITTED BY CONGRESSMAN PATRICK KENNEDY

QUESTION: Your budget request for Probation and Pretrial Services includes a requested increase of $862,000 for mental health treatment services. What is the amount in your base funding for these types of services?

ANSWER: $5.7 million is budgeted for mental health treatment services for fiscal year 2001.

QUESTION: Your budget justifications (page 5.29) describe the average costs of providing these types of services to post conviction offenders and pretrial defendants. Please describe the type and level of treatment these individuals receive, and include a discussion of how treatment is coordinated with the Federal Bureau of Prisons and other Federal agencies, as well as with local communities. Further, can you comment about the level of success you have had with these programs and any impact they have had on other aspects of the justice system such as costs for repeat offenders etc.

ANSWER:

Type and Level of Treatment these Individuals Receive:

Defendants and offenders with mental health problems require intensive monitoring and treatment tailored to their particular problem. Offenders and defendants may present significant problems that can include, for example, bipolar disorder, schizophrenia, and pedophilia. Many are dually-diagnosed as having both a mental health problem and a substance abuse problem and must be treated for both. The individual circumstances of each case dictate the type, length, and level of treatment provided.

In order to address the individual needs of offenders and defendants, probation and pretrial services offices may contract for one or more of the following services:

- Psychological/psychiatric testing and evaluation
- Individual/family/group counseling
- Sex offense-specific evaluation
- Sex offense-specific counseling: individual/family/group
- Mental health intake assessment and report
- Psychotropic medication

Coordination of Treatment with Federal Bureau of Prisons, Other Federal Agencies and Local Communities:

The Federal Bureau of Prisons (BOP) and the Administrative Office of the U.S. Courts (AO) have a memorandum of understanding (MOU) regarding inmate release planning that has been in place since 1995 to encourage smooth inmate transition from prison to the community. A smooth transition enhances public safety and increases the likelihood of a successful supervision experience for the offender. The MOU provides for the involvement of probation officers in inmate release planning during the final 60-90 days of confinement prior to a transfer to a Community Corrections Center or direct release to the community. The BOP and the AO also have an agreement concerning the continuity of substance abuse treatment from prison to

community and are currently working to similarly address mental health treatment.

Coordination with state and local community resources and other federal agencies (such as Indian Health Services) takes place as needed. Probation offices utilize "free" services, contract with vendors, and ride Bureau of Prisons contracts where available.

Level of Success with Programs and Impact on other Aspects of the Justice System:

The mental health treatment program provides probation officers access to psychological and psychiatric services for offenders, including medication and individual, family, and group counseling. Treatment helps officers to monitor and control the potential danger that offenders may pose to community. We are in the process of developing empirical performance measures of our supervision population, with emphasis on treatment outcomes, that will include both criminal justice measures such as recidivism and mental health outcomes as well.

QUESTION: Is there a uniform standard for mental health treatment throughout the court system?

All officers working with defendants and offenders who require mental health treatment follow standards published in Chapter XI (Mental Health Treatment) of the *Guide to Judicial Policies and Procedures*. The *Guide* delineates the responsibility of probation and pretrial services officers. Further, it provides them with information on identifying the mental health of offenders and defendants; how to understand clinical diagnoses and become familiar with all types of mental health disorders and their corresponding descriptive symptoms and behaviors; and how to develop the defendant/offender's prerelease plan, including setting up initial and subsequent personal as well as collateral contacts, and in coordinating mental health care or treatment services.

Probation and pretrial services offices contract for mental health treatment with providers in the community. These community providers must be licensed psychiatrists, or psychologists and social workers who possesses a minimum of a masters degree. The individual circumstances of each case, including diagnosis, time of onset, and response to previous treatment experience–including that received while in prison just prior to release--dictate the type, length, and level of treatment provided.

QUESTION: Comment about what the extent of our screening and counseling services in pretrial and probation services and what your recommendations are when everything else is taken care of as well for increasing perhaps those services.--And I would be interested in a really more detailed–and maybe staff could provide it for me–overview of what recommendations you have. If you were in Utopia, if we had a perfect work, in terms of addressing our probation problems.

Pretrial services officers investigate defendants charged with a federal crime and make a recommendation to the court whether to release or detain defendants. Probation officers conduct presentence investigations and prepare presentence reports to assist the court in determining the appropriate sentence for defendants who have been found or have pled guilty. Both probation and pretrial services officers provide supervision services. Pretrial services officers supervise defendants who are released to the community while they await their day in court, and probation officers supervise offenders sentenced with probation or serving a period of supervised release from prison.

Officers' supervision duties include visiting defendants and offenders at home, verifying that they are at work, monitoring their attendance at drug or mental health treatment, arranging for education and vocational training for them, helping them find jobs, and referring them to appropriate community resources.

The following 14 pages provide a detailed description of the activities performed by federal probation and pretrial services that enable the federal judiciary to effectively supervise defendants and offenders. In order to continue to successfully provide these services as the number of offenders and defendants continues to grow, the judiciary has requested additional funding. These increases include: $51.9 million in base adjustments to continue to fund the current probation and pretrial services staffing levels (pay and non-pay inflationary increases and annualization of new FY 2001 positions); $18.9 million to fund an additional 257 FTE associated with an increased number of offenders and defendants; and $5.2 million associated increases in the number of offenders and defendants requiring mental health and substance abuse treatment.

PricewaterhouseCoopers was selected in October 2000 to conduct an assessment of the probation and pretrial services program. This assessment will provide recommendations to improve service and a coordinated plan to implement the recommendations. The study will analyze a number of issues including the increasing responsibilities of federal probation and pretrial services offices and changing federal criminal populations. The assessment will determine whether there are ways to accomplish the program's mission more effectively through changes in functions, policies, management systems, processes, organization, assignment of responsibilities, resources, operational approaches, statutes, or regulations. The consultants will examine existing documentation, studies, and recommendations; analyze program trends and outcomes; and conduct interviews, on-site visits, and roundtable discussions with a broad base of relevant parties including probation and pretrial services staff in different districts, judicial officers and Department of Justice representatives. The assessment is expected to take approximately two years to complete. Once completed, the Administrative Office and the Judicial Conference will work to incorporate the appropriate recommendations into the judiciary's budget request.

QUESTION: Please comment about the extent of our screening and counseling services in pretrial and probation services and what your recommendations are when everything else is taken care of as well for enhancing probation and pretrial services in general.

Pretrial services officers investigate defendants charged with a federal crime and make a recommendation to the court whether to release or detain defendants. Probation officers conduct presentence investigations and prepare presentence reports to assist the court in determining the appropriate sentence for defendants who have been found or have pled guilty. Both probation and pretrial services officers provide supervision services. Pretrial services officers supervise defendants who are released to the community while they await their day in court, and probation officers supervise offenders sentenced with probation or serving a period of supervised release from prison.

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Court & Community
AN INFORMATION SERIES ABOUT U.S. PROBATION & PRETRIAL SERVICES
U.S. Probation & Pretrial Services

PROBATION OFFICERS

Did you know?

✓In the 94 federal judicial districts nationwide, more than 4,000 persons work as U.S. probation officers.

✓U.S. probation officers constitute the community corrections arm of the federal court system.

✓U.S. probation officers provide to the court two important services: *investigation* and *supervision*.

U.S. probation officers play an integral part in the federal criminal justice process. Simply stated, their mission is to investigate and supervise offenders whom the courts have conditionally released to the community on probation, parole, or supervised release. By serving as the court's fact-finder, controlling the risk offenders may pose to public safety, and providing offenders with correctional treatment, officers help ensure that persons previously convicted of crime choose a law-abiding lifestyle rather than further criminal behavior. Their responsibilities require them to work not only with federal judges and other court professionals, but with U.S. attorneys, defense attorneys, Federal Bureau of Prisons and U.S. Parole Commission officials, state and local law enforcement agents, treatment providers, and community leaders. Officers deliver services that benefit the court, the community, and the offender. Their primary duties are briefly described below.

1. The officer conducts a presentence investigation, gathering and verifying important information about the offender and the offense.

By order of the court, the officer makes a thorough investigation--a presentence investigation--into the circumstances of the offense and the offender's criminal background and characteristics. The officer gathers information in two ways: by conducting interviews and by reviewing documents. The cornerstone of the investigation is the interview with the offender, during which the officer inquires about such things as the offender's family, education, employment, finances, physical and mental health, and alcohol or drug abuse. The officer also conducts a home visit to assess the offender's living conditions, family relationships, and community ties and to detect alcohol or drugs in the home.

Besides interviewing the offender, the officer interviews other persons who can provide pertinent information about the offender and the offense, including the defense counsel, the prosecutor, law enforcement agents, victims, the offender's family and associates, employers, school officials, doctors, and counselors. The officer also reviews various records and reports, including court records, financial records, criminal history transcripts, probation/parole/pretrial services records, birth/marriage/divorce records, school records, employment records, military service records, school records, medical records, and counseling and treatment records. The officer verifies the information gathered, interprets and evaluates it, and presents it to the court in an organized, objective report called the presentence report.

2. The officer prepares a presentence report that helps the court determine the appropriate sentence.

The presentence report contains information about the offense, the offender, the impact of the offense on the victim, and sentencing options under the federal sentencing guidelines. It also includes information about the offender's ability to pay fines and restitution. The primary purpose of the report is to provide information that enables the court to impose a fair sentence that satisfies the punishment, deterrence, and corrective goals of sentencing. The officer considers applicable statutes and the federal sentencing guidelines, applies them to the facts of the case, and comes up with a recommended sentence and a justification for it.

Because the presentence report is so crucial to the sentencing process, it must be accurate and distinguish between information that is verified and unverified and between fact and opinion. The presentence report not only helps the court choose an appropriate sentence, but provides important information to help with the following:

- Federal Bureau of Prisons - Choosing the institution where the offender will serve the sentence. Selecting prison programs that will help the offender. Making the offender's release plans.
- U.S. Sentencing Commission - Providing information useful for monitoring sentencing guidelines application. Providing information useful for research.
- U.S. Probation Officer Supervising the Offender - Assessing the risk the offender poses. Assessing the offender's needs.

3. The officer recommends the conditions under which offenders are released to the community.

The officer proposes conditions of release in the presentence report. These conditions help structure the offender's movement and behavior in the community. They address many areas of the offender's life, including personal, financial, and health issues. The court imposes two kinds of conditions: standard and special. Standard conditions apply to all offenders. For example, they forbid

the offender to commit another federal, state, or local crime; require the offender to report as directed to the probation officer; and prohibit the offender's use of alcohol or drugs. Special conditions give the officer the authority to administer additional sanctions and provide correctional treatment and address specific risks the offender may present to himself or herself, others, and the community in general. For example, special conditions may require the offender to serve a period of home confinement, undergo drug testing or treatment, or disclose financial information.

When supervision begins, the officer assigned to supervise the offender fully explains the conditions of release and the consequences of not complying with them. The offender receives a written statement that sets forth the conditions.

4. The officer supervises offenders in the community to make sure they comply with court-ordered conditions of release.

Officers supervise, or monitor, all offenders conditionally released to the community by the federal courts, the U.S. Parole Commission, and military authorities. Community supervision gives officers the means to carry out the court's sentence and to accomplish offender rehabilitation and public safety goals.

Officers hold weighty public safety responsibilities. In supervising offenders, officers use risk control techniques designed to detect and deter criminal behavior. Such techniques include verifying employment, verifying income sources, monitoring offenders' associates, requiring offenders to undergo drug testing, and restricting offenders' travel. Also, if necessary, officers ask the court to modify the supervision conditions to provide for home confinement, financial disclosure, or other conditions to reduce risk.

Supervision begins with assessing the offender, identifying potential supervision problems, and making a supervision plan. Assessment is a determination as to the potential risk the offender poses and affects the amount of personal contact the officer has with the offender. The supervision plan identifies the offender's problems and how to resolve them. Problems are those circumstances that limit the offender's ability or desire to comply with supervision and that directly affect the offender's ability to complete supervision successfully. Examples of such problems–and supervision plans to address them–are shown in the chart on this page.

Officers periodically evaluate offenders' responses to supervision and revise supervision plans if necessary. Officers keep informed of the conduct and condition of offenders throughout supervision; help them improve, consistent with the court's order; and keep records of supervision activities. Offenders who do not comply with supervision conditions face sanctions ranging from reprimand to revocation proceedings. The most serious violations include violations for new criminal conduct, violations that compromise public safety, and absconding from supervision.

Supervision problem	Supervision plan
The offender is unemployed and on welfare. She has moved four times in the past year. Her two children are having problems at school.	Refer the offender to a community agency that will teach her a marketable skill. Make two personal contacts per quarter to require her participation in the job program.
The offender has several convictions for drunk driving and assault and battery where the complainant was his wife.	Make twice monthly personal contacts with the offender and his wife to see if the offender is drinking and how he interacts with his family. Check with his employer to see if alcohol abuse is affecting his attendance or performance. Refer him for an evaluation to determine alcohol abuse.
Offender is a known gang member with a history of drug trafficking.	See the offender twice a month at his home or his job to monitor his activities. Check regularly with the police department's intelligence division to see if the offender is associating with known criminals. Thoroughly investigate any requests by the offender to travel outside the district.

5. The officer controls the risk offenders may pose to themselves and others by providing correctional treatment to help offenders become productive members of the community.

Officers provide correctional treatment that helps offenders live law-abiding lives. These are activities designed to rehabilitate offenders by changing behavior that contributes to criminality and to reintegrate offenders into the community. Correctional treatment encompasses many services, including drug or alcohol treatment, mental health treatment, educational or vocational training, medical care, and employment assistance. The officer's job is to locate and use community resources to address offender needs in these areas or to arrange for services.

6. The officer uses special skills, works with particular caseloads, and takes on specialized responsibilities to further investigation, supervision, and officer safety goals.

Some officers hold specialist positions or perform special duties that require certain skills or expertise. Experience, on-the-job training, and training received from outside sources prepare officers for such positions. For example, drug and alcohol treatment specialists closely supervise drug- or alcohol-dependent offenders, require them to undergo drug testing and treatment, and arrange for appropriate treatment such as detoxification or counseling. Mental health treatment, home confinement, community service, sentencing guidelines, financial investigation, employment, and firearms are some other specialty areas.

Federal Corrections and Supervision Division
Administrative Office of the U.S. Courts
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Court & Community
AN INFORMATION SERIES ABOUT U.S. PROBATION & PRETRIAL SERVICES
U.S. Probation & Pretrial Services

PRETRIAL SERVICES OFFICERS

Did you know?

✓In the 94 federal judicial districts nationwide, U.S. pretrial services officers play an integral role in the administration of justice.

✓U.S. pretrial services officers balance the defendant's right to pretrial release with the court's concern that the defendant appear in court as required and not endanger the public.

✓U.S. pretrial services officers provide to the court two important services: *investigation* and *supervision*.

U.S. pretrial services officers are situated at a crucial place in the federal criminal justice process–the very start. In fact, officers often are the first court representatives defendants encounter after their arrest. In general, officers' mission is to investigate defendants charged with a federal crime, recommend in a report to the court whether to release or detain the defendants, and supervise the defendants who are released to the community while they await their day in court.

At the core of the day-to-day work of officers is the hallowed principle of criminal law that the defendant is presumed innocent until proven guilty. Officers must balance this presumption with the reality that some persons–if not detained before their trial–are likely to flee or to threaten others. Defendants may pose danger to a person, such as a victim or a witness, or to the community–that is, a threat that the defendant may engage in criminal activity. The officer's job is to identify persons who are likely to fail to appear or be arrested if released, to recommend restrictive conditions that would reasonably assure the defendant's appearance in court and the safety of the community, and to recommend detention when no such conditions exist. If the person does not pose such risk, the officer's mandate is to recommend to the court the *least restrictive* conditions that will reasonably assure that the person appears in court and poses no danger.

Officers deliver services that benefit the court, the community, and the defendant. Their responsibilities require them to work not only with federal judges, magistrate judges, and other court professionals, but with U.S. attorneys, defense attorneys, state and local law enforcement agents, and treatment providers. Their primary duties are briefly described below.

1. The officer conducts a pretrial services investigation, gathering and verifying important information about the defendant and the defendant's suitability for pretrial release.

The pretrial services investigation–which forms the basis of the officer's report to the court–calls for the officer to interview the defendant and to confirm the information the defendant conveys through other sources. The investigation begins when the officer is first informed that a defendant has been arrested. The arresting or case agent calls the pretrial services office and, ideally, provides information about the defendant (such as the defendant's name, date of birth, social security number, the charges, the circumstances surrounding the arrest, and where the defendant can be interviewed).

Before interviewing the defendant, the officer runs a criminal history check and also, if possible, speaks to the assistant U.S. attorney about the defendant, the charges, and the government's position as to whether to release or detain the defendant. The purpose of the interview is to find out what the defendant has been doing, where the defendant has been living, and where the defendant has been working (or what the defendant's source of support is).

What the officer learns from collateral sources–from other persons, from documents, and from on-line research–may verify what the defendant said, contradict it, or provide something more. The officer's research, for instance, may include contacting the defendant's family and associates to confirm background information, employers to verify employment, law enforcement agencies to obtain a criminal history, financial institutions to obtain bank or credit card statements, and the motor vehicle administration to check the defendant's license and registration.

Conducting the investigation in time for the defendant's initial appearance in court can be quite a challenge. Sometimes the officer must wait for the arresting agents to make the defendant available or for the U.S. marshals to finish processing the defendant. Sometimes the defense counsel is interviewing the defendant or tells the defendant not to answer the officer's questions. Sometimes the officer must wait for an interpreter or for an interview room. Sometimes verifying information is hard because the defendant gives false information or a false identity or because persons able to verify information are not available.

The interview may take place in the U.S. marshal's holding cell, the arresting law enforcement agency's office, the local jail, or the pretrial services office. During the interview, the officer talks to the defendant in private if possible, remains objective while interacting with the defendant, and explains that the information will be used to decide whether the defendant will be released or detained. The officer does not discuss the alleged offense or the defendant's guilt or innocence. The officer also does not give legal advice to the defendant or recommend an attorney.

2. The officer prepares a report that helps the court make an informed release or detention decision.

In preparing the pretrial services report, the officer addresses two basic questions: Is the defendant likely to come back to court and stay out of trouble? If not, what conditions should the court impose to increase the likelihood? The officer considers both *danger* and *nonappearance* factors before making a recommendation to the court to release or detain the defendant. For example, the offense with which the defendant is charged and the defendant's substance abuse history may present both danger and nonappearance considerations. Factors such as prior arrests and convictions or a history of violent behavior raise danger concerns. Factors such as the defendant's immigration status and ties to family and community may influence nonappearance.

If no risk factors are evident, the officer recommends release on personal recognizance. If risk factors exist, the officer recommends either release with conditions or detention. Release conditions are tailored to the individual defendant, but always include the universal condition that the defendant not commit a federal, state, or local crime during the period of release. The officer may recommend, and the court may set, conditions to accomplish any number of goals, including *prohibiting* possession of weapons, contact with victims, or use of alcohol or drugs; *restricting* the defendant's freedom of movement or with whom the defendant associates; and *requiring* the defendant to seek or maintain employment, obtain education or training, or surrender a passport. If the defendant is likely to fail to appear, the officer may recommend a financial bond, which the defendant (or the defendant's family) forfeits if the defendant fails to appear in court as directed.

3. The officer supervises offenders in the community to make sure they comply with court-ordered conditions of release.

Officers supervise defendants released to the community until they begin to serve their sentence, the charges are dismissed, or they are acquitted. Generally, officers' supervision responsibilities are to: 1) monitor defendants' compliance with their release conditions; 2) manage risk; 3) provide necessary services as ordered by the court, such as drug treatment; and 4) inform the court and the U.S. attorney if the defendant violates the conditions.

When the officer receives a case for supervision, the officer reviews the information about the defendant, assessing any potential risk the defendant presents and any supervision issues that may affect the defendant's ability to comply with the release conditions. The officer selects appropriate supervision strategies and develops a supervision plan, which the officer modifies if the defendant's circumstances change.

The officer carries out risk management activities to help ensure that the defendant complies with the release conditions, as the examples in the chart on this page show. Among the officer's routine supervision tasks are monitoring the defendant through personal contacts and phone calls with the defendant and others, including family members, employers, and treatment providers; meeting with the defendant in the pretrial services office and at the defendant's home and job; helping the defendant find employment; and helping the defendant find medical, legal, or social services. Also, some officers–for instance, drug and alcohol treatment specialists or home confinement specialists–perform special supervision duties that require certain skills or expertise.

Condition of release	Risk management activity
Maintain or commence an educational program.	☐Verify enrollment by contacting the registrar. ☐Obtain copies of registration forms, attendance sheets, transcripts, or report cards. ☐Contact the defendant at school. ☐Verify attendance with relatives.
Abide by specified restrictions on personal associations.	☐Visit the defendant's home, job, or school unannounced. ☐Communicate with other officers who supervise the defendant's codefendants to make sure there has been no contact. ☐Contact law enforcement agents, the assistant U.S. attorney, or the defendant's family to monitor compliance.
Refrain from using drugs.	☐Give periodic, unannounced drug tests. ☐If test results are positive, and drug treatment is not a release condition, ask the court to modify the release order to require treatment. ☐Look for physical signs of drug abuse. ☐Contact family, employers, and law enforcement agents to monitor compliance.

If the release conditions become unnecessary, the officer asks the court to remove them. If the defendant violates the release conditions, the officer notifies the court and the U.S. attorney. Depending on the circumstances, the officer may recommend that the court conduct a hearing to decide whether to modify the release conditions, revoke the defendant's bail, issue a bench warrant, or order the defendant detained.

4. The officer, at the request of the U.S. attorney, investigates whether the defendant is suitable for placement in a pretrial diversion program.

Pretrial diversion is an alternative to prosecution that diverts the defendant from prosecution to a program of supervision administered by the pretrial services officer. The U.S. attorney identifies candidates for diversion–persons who have not adopted a criminal lifestyle and who are likely to complete the program successfully. The pretrial services officer investigates the individual, recommends for or against placement, and recommends length of supervision and special conditions. Diversion is voluntary; the person may opt to stand trial instead. If the individual is placed in the program, he or she is supervised by a pretrial services officer. If the person successfully completes supervision, the government declines prosecution and makes no record of the arrest.

Federal Corrections and Supervision Division
Administrative Office of the U.S. Courts
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Court & Community
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U.S. Probation & Pretrial Services

BENEFITS OF SUPERVISION

Did you know?

✓More than 98,000 defendants and offenders who have been released to the community by the federal courts are currently supervised by U.S. probation and pretrial services officers.

✓These defendants and offenders are on probation, on parole, on supervised release after a period of incarceration, or under pretrial supervision while waiting to appear in court.

✓In supervising defendants and offenders, officers serve as agents of the court, ensuring that these individuals comply with court-ordered release conditions, minimizing the danger they pose to the public, and promoting law-abiding behavior.

✓Officers' supervision duties include visiting defendants and offenders at home, verifying that they are at work, monitoring their attendance at drug treatment or mental health counseling, arranging for educational or vocational training for them, helping them find jobs, and referring them to appropriate community resources.

What are the benefits of supervision?

A significant benefit is that community supervision is a cost-saving alternative to jail or prison. On average, it costs almost $60 a day to house a person in the federal prison system as compared with less than $8 a day to supervise that person in the community.

Many of supervision's benefits directly affect the safety of the community and the lives of the defendants and offenders under supervision. Listed below are six such benefits illustrated by actual probation and pretrial services cases.

1. Supervision gives officers the means to enforce conditions of release ordered by the court, such as those requiring persons to perform community service or pay fines and restitution.

Twenty-one offenders in the Middle District of Florida, each ordered by the court to perform community service, participated in a week-long project in Ocala National Forest, which was coordinated by the probation office. The offenders' efforts resulted in numerous improvements to the park and saved thousands of taxpayer dollars. The group cleared and dug trails, laid sod, installed tile in restrooms, and hung lighting. These were improvements that probably would not have been made otherwise because of lack of funds.

In the Eastern District of Wisconsin, a probation officer's rigorous enforcement of the conditions of supervision compelled one offender–a businessman who had embezzled from his employees' pension funds–to give back to his victims what he had taken. Despite the offender's protests that he did not have money to pay restitution, the officer's scrutiny of the offender's affluent lifestyle and his questionable commingling of business and personal finances revealed otherwise. As a result of the officer's efforts, the offender paid $40,000, the balance of restitution owed.

2. Supervision protects the public by reducing the risk that persons under supervision will commit future crimes.

Mental health counseling, which included a polygraph examination to gauge the danger the offender posed to the community, revealed that an offender on supervised release in the Eastern District of Tennessee for transmitting pornography on the Internet was stalking an eight-year-old girl. The child's family was notified, the offender received treatment to address the problem, and a potential sexual assault was averted.

In the Southern District of Ohio, the probation office helped ensure community safety by dedicating considerable resources to the intensive supervision of one offender, a confirmed anti-abortionist convicted in two federal courts of damaging or conspiring to damage abortion clinics. A team of officers worked together to supervise the offender,

who lived in a remote area, restricting the man's travel, monitoring his associates, and mobilizing to verify his whereabouts every time abortion clinics or their staffs were targets of violence. The offender completed his supervision without incident.

3. Supervision may provide substance abuse treatment to enable defendants and offenders to cope without relying on drugs or alcohol.

Desperate to hide her drug use and beat the drug testing that the court required her to undergo, a defendant on pretrial supervision in the Eastern District of North Carolina ingested a homemade drug-masking agent that contained bleach. She was lucky to survive. The woman's pretrial services officer, working with contract counselors, arranged to place her in an inpatient drug treatment program, where she responded well to treatment.

To support her and her boyfriend's cocaine habits, a teller embezzled bank funds. The woman, who was from a stable, middle-class family and who had not used drugs until she met her boyfriend, was placed in a diversion program, rather than jail, in the Northern District of Ohio. Pretrial services enrolled the woman in a drug treatment program–which she successfully completed–and put her in touch with a support group for women in abusive relationships. She was able to leave her boyfriend, who had threatened her constantly.

4. Supervision may provide mental health treatment to enable defendants and offenders to function better in the community.

Intensive supervision by the probation officer has kept an offender in the District of Delaware stable for nine months now, the most time the individual has been stable without hospitalization since the age of 13. Released after serving a sentence for mailing threatening communications, the offender–a schizophrenic with a history of substance abuse and violence–had no job, no home, and no relatives. The officer found him temporary shelter and arranged for the probation office to pay for the medication that allowed the man to function.

Quick action to arrange for emergency psychological counseling and halfway house placement most likely prevented the suicide of an offender who was on supervised release in the Middle District of Florida. His wife had left him, he was living in a hotel, and he had been robbed of his savings when he got drunk, got a gun, and called his probation officer to apologize for disappointing her. The officer kept him talking, tracked him down, and provided immediate assistance.

5. Supervision may provide educational or vocational training that boosts defendants' and offenders' capacity to earn a living.

A woman came to the probation and pretrial services office in the Eastern District of Texas with multiple problems: depression, a history of drug use, and illiteracy. The court ordered mental health treatment and participation in a literacy program as conditions of the woman's supervision. Working with a contract treatment provider, the pretrial services officer had the woman evaluated for both depression and dyslexia, helped her find an appropriate educational program, and arranged for individual counseling.

A defendant who was arrested in the Northern District of Ohio for distribution of heroin and possessing a firearm during the commission of a crime had a 13-year heroin addiction and spoke no English. He withdrew from heroin while in detention and then was placed in residential treatment. The probation office located a community group that serviced the area's small Spanish population, and the group was willing to translate for the man and give him English lessons. His English improved immensely. He transferred to an independent living program, received individual counseling, and attended weekly Alcoholics Anonymous and Narcotics Anonymous meetings. He also got a job for the first time in his life.

6. As an alternative to incarceration, supervision allows individuals to live with their families, hold jobs, and be productive members of society.

In spite of a strong recommendation for detention from the assistant U.S. attorney, a defendant who was from the Eastern District of North Carolina but arrested in New York City was placed in a halfway house at the pretrial services officer's recommendation. That way, he could work to support his wife and children. During supervision, he got a job, sent money home to his family, and contributed toward his subsistence cost at the halfway house. He complied with all conditions of release and did so well on supervision that eventually he was allowed weekend visits with his family at the home of relatives nearby.

While awaiting sentencing for trying to rob a bank by calling in a bomb threat, a single mother of three in the Northern District of Ohio was able to hold a job, remain sober, and continue caring for her children with the help of an intensive outpatient substance abuse program and psychological counseling arranged for by the pretrial services office.

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MENTAL HEALTH TREATMENT

What is mental health treatment in the federal probation and pretrial services system?

Mental health treatment is a risk management tool that helps U.S. probation and pretrial services officers supervise, or monitor, defendants and offenders in the community. Mental health treatment may include such services as psychological/psychiatric testing and individual, family, or group counseling by a psychologist, psychiatrist, or other licensed practitioner. It also may include medication.

Who receives mental health treatment?

Mental health treatment is ordered either by the U.S. district court or by the U.S. Parole Commission as a condition of releasing individuals under federal supervision to the community. These persons either are on probation, parole, or supervised release after being in prison, under pretrial supervision while awaiting a court appearance, or conditionally released after incarceration at a Bureau of Prisons mental health facility.

What is the purpose of mental health treatment?

Mental health treatment gives officers the means to directly address the individual's mental health condition. For offenders under post-conviction supervision, treatment helps officers enforce the conditions imposed by the court or Parole Commission, control the danger defendants and offenders may pose to society, deter criminal behavior, and promote law-abiding behavior. For defendants under pretrial supervision, treatment helps officers reasonably assure that these persons appear in court and that society is protected from potential harm.

When is a defendant or offender considered to be suffering from a mental health disorder?

According to the *Guide to Judiciary Policies and Procedures*, a defendant or offender is considered to be suffering from some form of mental disease or defect when the individual's behavior or feelings deviate so substantially from the norm as to indicate disorganized thinking, perception, mood, orientation, and memory. Mental health disease or defect may range from the mildly maladaptive to the profoundly psychotic and may result in unrealistic or aberrant behavior, grossly impaired judgment, inability to control impulses or to care for oneself or meet the demands of daily life, loss of contact with reality, or violence to oneself or others.

How do officers identify mentally disordered persons?

Individuals may come to the probation or pretrial services office already diagnosed with a mental disorder. Or, officers may identify these persons through information in case files, interviews with the individuals and their families and friends, or consultation with mental health professionals.

How many mentally disordered persons do U.S. probation and pretrial services officers supervise?

Currently, of the more than 98,000 persons under the supervision of U.S. probation and pretrial services officers, almost 9,000 are mentally disordered. Although the number of mentally disordered defendants and offenders under supervision is relatively small, the persons in this particular group can be especially challenging to supervise.

How is supervising these individuals difficult?

Compared to the average defendant or offender, the mentally disordered person under supervision routinely needs more intensive monitoring, is potentially more dangerous, and often requires specialized or individualized treatment. What these individuals may suffer from ranges from anxiety and depression to more serious disorders such as bipolar disorder, schizophrenia, or pedophilia. Many of them are dually diagnosed, having both mental health and substance abuse problems. Because of the complexity of these cases, the federal probation and pretrial services system has designated some of its officers as mental health specialists. More often than not, these specialists have a background in mental health and, in some cases, are licensed clinical social workers or psychologists. The mental

health specialists are skilled in identifying mentally disordered offenders, in brokering community treatment services, and in working with treatment providers.

What role do officers play in supervising mentally disordered defendants and offenders?

The *Guide to Judiciary Policies and Procedures* clearly sets forth officers' duties to conduct prerelease or presentence investigations for the court and to supervise defendants and offenders in the community. Officers play a crucial role in assessing dangerousness and the risk defendants and offenders may pose to themselves and others. Fulfilling such responsibilities requires officers to maintain knowledge of the persons under their supervision, make correctional treatment available to them, enforce the conditions of release imposed by the court or Parole Commission, and report violations of these conditions according to established standards and procedures.

Who provides mental health treatment to defendants and offenders?

Counselors, clinicians, and other professionals in the community provide treatment under an agreement with the United States courts. The Director of the Administrative Office of the U.S. Courts, under 18 U.S.C. § 3672, has the authority to "contract with any appropriate public or private agency or person for the detection of and care in the community of . . . a person suffering from a psychiatric disorder . . ." Blanket purchase agreements or purchase orders are awarded through a competitive process. The officer serves as *coordinator* of treatment services, matching the defendant or offender with appropriate treatment providers, monitoring the person's progress in and compliance with treatment, controlling procurement funds, and overseeing the various treatment providers.

What services do mental health contractors provide?

No single treatment approach will help every person who requires mental health treatment. To be able to address defendants' and offenders' individual needs, officers must solicit for various services, including:

- Psychological/psychiatric evaluation and testing
- Individual, group, and family counseling
- Sex offender-specific individual or group therapy
- Psychosexual evaluations for sex offenders
- Polygraph testing for sex offenders
- Substance abuse counseling
- Medication
- Transportation to and from treatment facilities
- Emergency financial assistance for food or clothing
- Clinical consultation between officers and mental health professionals to discuss supervision issues

What are the benefits of mental health treatment?

Mental health treatment helps defendants and offenders in many ways. It helps individuals address issues that may have led to their problems with the law. Treatment gives these individuals the tools to handle life's stresses and to function better in the community. Treatment helps officers monitor the danger defendants and offenders may pose to the community and provides a way to ensure that persons under supervision comply with the general and the special conditions of release the court or Parole Commission imposed.

What if treatment is not successful?

While officers may try various treatment approaches and increasingly severe sanctions with mentally disordered defendants and offenders, they may find it necessary to initiate revocation proceedings if these persons do not comply with the conditions of release. Often, officers must initiate such proceedings because these individuals pose a potential threat to society.

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SUBSTANCE ABUSE TREATMENT

What is substance abuse treatment in the federal probation and pretrial services system?

Substance abuse treatment is a tool that helps U.S. probation and pretrial services officers supervise, or monitor, defendants and offenders in the community. This treatment, which includes urine testing and services such as counseling and detoxification, is provided to persons who abuse illegal drugs, prescription drugs, or alcohol. These individuals either are on probation, on parole, on supervised release after being in prison, or under pretrial supervision while awaiting a court appearance. Treatment is ordered either by the U.S. district court or by the U.S. Parole Commission as a condition of releasing these persons to the community.

How does substance abuse treatment help officers carry out their supervision responsibilities?

Treatment gives officers the means to directly address individuals' alcohol or drug abuse. For offenders under post-conviction supervision, treatment helps officers enforce the conditions set by the court or Parole Commission, control the danger defendants and offenders may pose to society, and promote law-abiding behavior. For defendants under pretrial supervision, treatment helps officers reasonably assure that these persons appear in court and that society is protected from harm. The Substance Abuse Treatment Program provides the framework for supervising persons with drug problems.

What is the Substance Abuse Treatment Program?

Administered by the Administrative Office of the U.S. Courts since 1979, the Substance Abuse Treatment Program (SATP) is a national program that guides U.S. probation and pretrial services officers in identifying and treating the substance abusers under their supervision. The program's goal–to promote abstinence from drugs–is achieved through close supervision, drug testing, and appropriate treatment. The SATP enables officers, some of whom are substance abuse specialists, to supervise substance-abusing defendants and offenders in the community and to ensure public safety while doing so.

What are substance abuse specialists, and what do they do?

In 1983, the U.S. probation and pretrial services system created specialist positions to provide intensive supervision to substance abusers. This step allowed districts to set up specialized caseloads to meet the demands these particular cases generate. Specialists are senior officers whose job is to oversee and manage the SATP in their offices. They oversee contract treatment services to ensure that contractors deliver the services required. They may supervise a caseload or may just monitor contracts. They serve as experts in confronting substance abuse and intervening to provide appropriate correctional treatment, training and directing their fellow officers in substance abuse matters.

How do officers identify substance abusers?

There are several ways. Defendants or offenders may simply tell their officers that they have a substance abuse problem. Repeat offenders may have been identified previously as drug users. Or, officers, who are trained to look for the physical and behavioral signs of substance abuse, may determine that a person has a problem. Officers may identify these persons through information in records and reports (including information from state and local law enforcement agencies), interviews with the individuals and their families, or drug testing. Also, many officers use formal evaluations and testing methods to screen for substance abuse. One important consideration in identifying substance abusers is whether they also suffer from mental health problems. These are "dual diagnosis" cases and require officers to develop supervision plans that address both problems.

How many individuals are receiving substance abuse treatment?

As of December 30, 1999, more than 35,000 persons under the supervision of U.S. probation and pretrial services officers were receiving substance abuse treatment. This was 30 percent of the total number of post-sentence cases and 20 percent of the pretrial cases.

How is substance abuse detected?

Officers use breathalyzers to test for alcohol. They use urinalysis to test for drugs. Urinalysis can be ordered by the court or the U.S. Parole Commission. Officers also may use it periodically when an individual's behavior indicates that he or she may be using drugs. Testing usually is unscheduled or random. The person has less than 24 hours' notice that a specimen will be collected. Urinalysis is a useful tool to deter the recreational drug user as well as the long-time drug user.

How is drug testing accomplished?

The Administrative Office contracts with a national laboratory to test urine specimens for the presence of drugs or their metabolites. The laboratory routinely tests for five major categories of drugs: opiates, cocaine, amphetamines, phencyclidine, and marijuana. Under the contract, the laboratory also provides specimen collection supplies to the probation and pretrial services offices, performs tests to confirm positive results, and furnishes expert testimony or affidavits if necessary for court proceedings.

How often are persons under supervision required to submit specimens and undergo treatment?

Requirements vary, depending on the individual's compliance with supervision conditions. National policy established a "phase" system, which sets minimum standards for the number of specimens and counseling sessions required monthly. If specimens are negative and counseling sessions go well, the number of urine collections and sessions required decreases over time. The phase process, with its gradually decreasing requirements, takes about a year to complete.

Do officers use other methods to check for drug use?

Yes. Some probation and pretrial services officers have on-site urine testing equipment. Some use hand-held drug testing kits. Some have adopted the sweat patch, which is a bandaid-like device that tests perspiration for the presence of drugs. In addition to mechanical methods to detect drug use, officers rely on observing defendants and offenders at work, at school, and in the community. For instance, during home visits, officers look for alcohol, drug contraband, and other evidence of substance abuse.

Who provides treatment?

Treatment is provided sometimes directly by officers but most often comes either from community programs that provide services at no cost to the federal government or from treatment providers who are under contract to the United States courts. The Director of the Administrative Office, under 18 U.S.C. § 3672, has the authority to "contract with any appropriate public or private agency or person for the detection of and care in the community of an offender who is an alcohol-dependent person, an addict, or a drug-dependent person. . . ." Approximately 2,000 contractors nationwide currently provide substance abuse services. Contracts are awarded through a competitive process. The specialist serves as *coordinator* of treatment services, matching the defendant or offender with appropriate treatment providers, monitoring the person's progress in and compliance with treatment, controlling treatment and testing funds, and overseeing the various treatment providers.

What services do substance abuse contractors provide?

No single treatment approach will help every person. To be able to address defendants' and offenders' individual needs, officers require access to various types of treatment. Contractors may provide a full range of services, including

- Intake assessments
- Individual, group, family, and intensive outpatient counseling
- Detoxification or antagonistic treatment
- Physical examinations
- Psychological/psychiatric work-ups
- Psychotherapy
- Specimen collection
- Substance abuse prevention and relapse prevention programs
- Vocational testing, training, and placement
- Methadone maintenance and methadone detoxification
- Transportation

What are the benefits of treatment?

Ideally, treatment makes a drug- or alcohol-abusing defendant or offender better able to function in the community. It can motivate individuals to abstain from drugs or alcohol and teach them to cope without using these substances. It can influence a person to become a productive member of society rather than a drain on community resources. Treatment provides a way for officers to monitor and control defendants' and offenders' behavior. It therefore helps officers protect the public and reduce the risk that substance-abusing individuals will commit future crime--for instance, that they will resort to robbery or assault to support their drug use.

What if substance abuse continues despite treatment?

Revoking supervision may be in order. While officers should try any viable treatment approaches before initiating revocation, substance abusers must face the consequences of their actions. If these individuals continue to submit positive specimens, fail to give specimens ("stall"), give adulterated specimens, or otherwise fail to comply with court-ordered treatment, officers report such noncompliance to the court.

Federal Corrections and Supervision Division
Administrative Office of the U.S. Courts
September 2000

Court & Community
AN INFORMATION SERIES ABOUT U.S. PROBATION & PRETRIAL SERVICES
U.S. Probation & Pretrial Services

COMMUNITY SERVICE

Consider the following:

▼*A work crew spends a week in a national forest, clearing trails and constructing campsites.*

▼*A college student cares for and feeds autistic and wheelchair-bound children at a school for the disabled.*

▼*A construction company builds a dike in a state wildlife refuge that has been ravaged by floods.*

▼*A homemaker delivers meals to senior citizens and shut-ins at home.*

▼*A heavy equipment operator grades roads, plows snow, and bulldozes sanitary landfill on an Indian reservation.*

▼*Employees of a software design company teach computer skills to middle school students in a low income neighborhood.*

None of them gets paid. They are neither volunteers, Good Samaritans, nor community activists. They are people--and businesses--convicted of crimes and ordered by the court to perform community service.

What is community service? Community service is unpaid work by an offender for a civic or nonprofit organization. Public libraries, soup kitchens, recycling centers, literacy programs, conservation programs, and senior citizen centers all are likely recipients of community service.

In the federal courts, community service is not a sentence, but a special condition of probation or supervised release. In preparing a presentence report, which the court relies on in choosing a fair sentence, the probation officer may recommend that the court require community service. In fiscal year 2000, nearly 5,600 federal offenders were sentenced to probation or a term of supervised release with a community service condition, with courts ordering over a million hours of service.

The court requires that the offender complete a specified number of hours of community service (usually from 100 to 500) within a given time frame (usually not to exceed one year). For corporations--and sometimes for individuals--the court may designate a particular task to be completed rather than a certain number of hours to be worked. Businesses may be required to donate their employees' time and skills to community service projects.

Community service addresses the traditional sentencing goals of punishment, reparation, restitution, and rehabilitation:

■**Punishment** - Community service adds a punitive measure to probation. It restricts offenders' personal liberty and requires them to forfeit their leisure time.

■**Reparation** - Community service allows offenders to atone or "make the victim whole" in a constructive way.

■**Restitution** - Community service may be regarded as a substitute for financial compensation to individual victims or a form of symbolic restitution when the community is the victim.

■**Rehabilitation** - Community service fosters a sense of social responsibility in offenders and allows them to improve their self-image through serving the community. It also instills a work ethic and helps offenders develop interests and skills.

With a careful selection process, courts can use community service successfully with a wide spectrum of offenders: corporations and individuals, first offenders and recidivists, the indigent and the affluent, juveniles and senior citizens. But not every offender is a good candidate for community service. Persons who present a threat to the community are not eligible to participate. These include individuals with a current drug or alcohol addiction, a history of assault or sexual offenses, or serious emotional or psychological problems.

Courts look for offenders with personal and social stability, who are willing and motivated, and who have no criminal history of violence.

Probation officers play a vital role in making community service work. They work closely with the community organizations in which offenders are placed and with the offenders themselves. Officers promote the concept of community service, seeking agencies that are willing to take on offenders, supervise them adequately, and provide them with sufficient and suitable work. The agencies must be nonprofit, tax exempt, and not politically partisan. They must serve a valid need in the community. Officers make certain that agencies know how community service works and what it requires of them.

The officer's task is to assign to the community agency a responsible individual who can provide valuable services. In matching the offender to the agency, the officer's top consideration is the court's sentencing objective (is the community service intended primarily to be a punishment? Or is the goal more to help the offender develop job skills?). Then the officer considers the offender's interests and abilities, as well as any potential stumbling blocks, such as a conflict with the offender's work schedule, child care problems, or a lack of transportation.

The officer meets with the offender and the agency to discuss expectations, confirm the work schedule and duties, and answer questions. The officer periodically visits the agency to monitor the offender's service and also resolves any problems. The officer also informs the court of the offender's progress–or lack of it.

Success depends on the offender's ability to accept the community service obligation and see it through. Sometimes, though, offenders do not comply with their community service order. If an offender is often late or absent, performs unsatisfactorily, or behaves unacceptably, the officer will take action. The offender may face sanctions ranging from reprimand to revocation.

If we translated community service hours into dollars–using minimum wage–the 628,000 hours served nationwide in fiscal year 2000 would have had a dollar value of more than $3 million. As the chart on this page shows, community service brings benefits to the offender, the community, the victim, and the court. Community service offers a way for the offender to repay or restore the community. It is a flexible, personalized, and humane sanction. Community service is practical, cost-effective, and fair–a "win-win" proposition for everyone involved.

Community service gives OFFENDERS -	➧A sanction that is less restrictive than prison. ➧A sanction that allows them to meet their job and family commitments. ➧The chance to give something back to society and to help others. ➧An opportunity to get work experience, job skills, and references. ➧A boost to their self-esteem.
Community service gives THE COMMUNITY -	➧Free labor. ➧Services that oftentimes would not be available because of lack of funding. ➧Saved taxpayer dollars that would otherwise go for prison costs. ➧The chance to participate in the correctional process. ➧An opportunity to change negative perceptions about offenders.
Community service gives VICTIMS -	➧A sanction that makes tangible demands of offenders. ➧The satisfaction of knowing that offenders did not evade responsibility for their crimes.
Community service gives THE COURTS -	➧A fair and cost-effective sanction. ➧A sentencing alternative that serves sentencing goals.

Federal Corrections and Supervision Division
Administrative Office of the U.S. Courts
February 2001

Court & Community
AN INFORMATION SERIES ABOUT U.S. PROBATION & PRETRIAL SERVICES
U.S. Probation & Pretrial Services

HOME CONFINEMENT

Arrested and charged with possession of a controlled substance with intent to distribute, William, a 30-year-old man with a history of substance abuse, awaits his "day in court," which is 3 months away.

Meanwhile, William must remain at home, except for a few select activities. During the week, he leaves the house for his job as a welder at precisely 7 a.m. and returns home no later than 5 p.m. He attends the 7 p.m. meeting of Narcotics Anonymous at the local library every Thursday. He grocery shops at 2 p.m. every Saturday and goes to church–always attending the 10 a.m. service–every Sunday.

William is not just on a rigid schedule, he is under home confinement. Instead of sending him to jail, the court decided to release him to the community on the condition that he remain at home except for certain approved activities. His presence in his home and his absences from it are monitored electronically by an ankle bracelet he wears 24 hours a day.

In the federal courts, approximately 16,000 defendants and offenders under the supervision of U.S. probation and pretrial services officers were on home confinement in 1999. Home confinement, a form of community-based corrections, is one method the courts use to restrict the freedom of defendants and offenders and protect society. In most cases, officers use electronic monitoring as a tool in supervising persons on home confinement. Home confinement is not a sentence in and of itself but may be a condition of probation, parole, or supervised release, as well as a condition of pretrial release. Courts may use it as a sanction for persons who violate the conditions of their supervision. Also, the Federal Bureau of Prisons may use it for inmates released to serve the last part of their sentence under the supervision of U.S. probation officers.

A benefit of the home confinement program is that it costs about one-third the cost of custody. In providing an alternative to incarceration, it allows defendants and offenders to continue to contribute to the support of their families and pay taxes.

Moreover, courts may order program participants to pay all or part of electronic monitoring costs.

Home confinement's purpose depends on the phase of the criminal justice process in which it is used. In all cases, it is a means to protect the public. In pretrial cases, home confinement is an alternative to detention used to ensure that individuals appear in court. In post-sentence cases, home confinement is used as a punishment, viewed as more punitive than regular supervision but less restrictive than imprisonment. The persons under home confinement are confined to their residence, linked to an electronic monitoring system, and required to maintain a strict daily activity schedule. When they are allowed to leave home, and for what purposes, is determined case by case. These court-imposed restrictions, combined with close supervision by a probation or pretrial services officer, help deter further crime, ensure the safety of the community, and bring order to the defendant or offender's life. While electronic monitoring does not necessarily prevent a defendant or offender from committing a new crime, it does enhance officers' ability to supervise effectively.

The home confinement program in the federal courts has three components, or levels of restriction. *Curfew* requires the program participants to remain at home every day at certain times. With *home detention*, the participant remains at home at all times except for pre-approved and scheduled absences, such as for work, school, treatment, church, attorney appointments, court appearances, and other court-ordered obligations. *Home incarceration* calls for 24-hour-a-day "lock-down" at home, except for medical appointments, court appearances, and other activities that the court specifically approves.

Officers screen defendants and offenders to determine eligibility for the program. Certain categories of serious or repeat offenders are not allowed to participate. Prior criminal record, history of violence, and medical and mental health conditions and needs are factors that officers carefully consider. Previous failures on supervision, risk to the public that the person presents, third-party risk (such as previous incidents of domestic violence in the

household), and the person's willingness to participate are considerations as well.

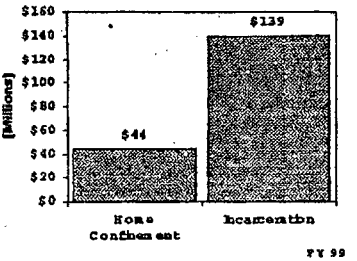
The residence and telephone service also influence the decision. The cooperation of all occupants of the home is essential. The person in the household who subscribes to phone service must be willing to allow the phone to be used for electronic monitoring purposes. Using the phone for electronic monitoring places restrictions on access to the phone and on special features such as call waiting.

The participant wears a tamper-resistant transmitter on the ankle 24 hours a day. The transmitter emits a radio frequency signal that is detected by a receiver/dialer unit connected to the home phone. When the transmitter comes within range of the receiver/dialer unit, that unit calls a monitoring center to indicate that the participant is in range, or at home. The person must stay within 150 feet of the receiving unit to be considered in range. The transmitter and the receiver/dialer unit work together to detect and report the times participants enter and exit their homes. They do not tell where persons have gone or how far they have traveled.

The Administrative Office of the U.S. Courts contracts with an electronic monitoring company to provide equipment and around-the-clock electronic surveillance to U.S. probation and pretrial services offices nationwide. The company's monitoring center provides daily monitoring reports that document participants' 24-hour activities. It also tracks all key events and reports them promptly to the officers who supervise persons on home confinement. Key events include unauthorized absence from home, failure to return home after an authorized absence, and leaving home early or returning home late. Key events also may be triggered by equipment malfunctions, tampering with the equipment, and loss of electrical power or phone service. Participants must notify officers immediately if they lose electrical power or phone service, if they remove the transmitter because of an emergency, or if they experience any problems with the monitoring equipment.

The home confinement program requires more than just electronic monitoring. Close supervision by officers is crucial to success. Officers monitor program participants to ensure that they are working, maintaining a stable living arrangement, and not engaging in prohibited behavior such as substance abuse. Officers also check monitoring equipment at least monthly to make sure that it is working and to look for signs of tampering.

Cost Comparison of Home Confinement and Incarceration



The officer's job is demanding, time consuming, and sometimes dangerous. It requires frequent phone calls to make sure participants are adhering to their approved schedules; frequent unannounced, face-to-face visits; and 24-hour, 7-day response to alerts from the monitoring center. One very useful tool that some officers use is a hand-held monitoring unit, called a "drive-by," which can help verify participants' presence at specific locations. This device allows officers, without leaving their cars, to check whether participants are at approved locations such as work, the doctor's office, or church.

Participants who comply with program rules may be eligible to use earned leave. Earned leave is a privilege that allows participants to be away from home for a set time period for recreation. Each district sets parameters for earning and using leave and specifies approved activities to attend or participate in during leave.

Program participants who do not comply with the conditions of their supervision may face sanctions ranging from reprimand, to loss of earned leave privileges, to revocation proceedings. The most serious violations include violations for new criminal conduct, violations that compromise public safety, and absconding from supervision. Violations that concern the home confinement program in particular include not adhering to the approved leave schedule, going to an unapproved location or activity, and tampering with equipment.

Federal Corrections and Supervision Division
Administrative Office of the U.S. Courts
September 2000

QUESTIONS SUBMITTED BY CONGRESSMAN BUD CRAMER

QUESTION: The Judiciary's FY 2002 budget request includes funding to open two (2) new federal defender organizations (FDOs). Where will these offices be located? What criteria does the Judiciary use in determining the need for a new FDO? Is it more expensive or less expensive to establish an FDO in a district versus having panel attorneys take all of the cases?

ANSWER: The projection of two new defender offices in FY 2002 is based on a historical average of the number of districts that request and qualify for an office each year. The exact locations of these offices is not known at this point.

The Judicial Conference has endorsed the establishment of a FDO in all judicial districts, where feasible, and where requested by the district. The judiciary examines the following criteria in determining the need for a new FDO:

- **Quality of representation** - districts with a federal defender organization generally provide higher quality representation than do districts without one. Federal defenders are federal criminal law specialists who understand the intricacies of the sentencing process, receive regular training by the judiciary, and become experienced at working with other components of the criminal justice system. Federal defenders, by providing training and other services, also increase the quality of panel attorney representation.

- **Difficulty in recruiting qualified attorneys to serve on the panel and accept appointments** - due to the specialized nature of federal criminal law, the low hourly rates paid to court-appointed counsel, and the large growth in the CJA caseload in recent years, many courts experience difficulty obtaining qualified attorneys to accept appointments.

- **Administrative burden on the court in managing the court-appointed program** - FDOs relieve the court of much of the administrative burden and costs associated with the CJA program (e.g., case-by-case appointment of panel attorneys; a judge's review of compensation and expense vouchers; and voucher processing and payment).

- **Cost per case** - if a federal defender organization is projected to be more costly than panel attorney representation, the judiciary considers whether the factors discussed above as applied to a specific district outweigh the increased cost. For these and other reasons, since 1990, the number of federal judicial districts served by FDOs increased 74%, from 46 to 80 districts.

The judiciary estimates that the cost per case for a FDO nationally is slightly higher than the cost per case for panel attorney representation. In large part, the higher cost per case for FDOs is due to the below-market hourly rates paid to CJA panel attorneys. The cost per case estimate does not include the benefits federal defenders provide to panel attorneys that should contribute to more efficient representation (e.g., training; brief and motions banks) as well as the increase in judicial efficiency (e.g., filing of appropriate motions by federal defenders; coordinating efforts among defense counsel in multi-CJA defendant cases; reduction of the administrative burden associated with appointing counsel and reviewing vouchers).

QUESTION: Could you provide me with some background on the courthouse construction program and how it relates to the CJSJ subcommittee?

The judiciary's courthouse construction program was undertaken to remedy severe problems with GSA's existing courthouses. Many of the existing court facilities were built over 50 years ago and have not been or cannot be altered to meet the needs of a modern day justice system. Court facilities must keep pace with the need for additional judges and court employees to handle the rapidly increasing workload of the federal courts. Since 1990, there has been a 32 percent increase in court staff and a 29 percent increase in judicial officers. There are currently requests for both additional Article III and Bankruptcy Judgeships that will place an even greater space demand on the courthouses. The workload has increased due to the federal war on crime and the illegal drug trade, the broader civil jurisdiction of the federal courts, the substantial rise in bankruptcy filings, and the need for probation and pretrial services staff to supervise about the same number of people as are in the federal prison system. Existing court facilities often lack adequate security. Problems include a lack of separate corridors to transport prisoners, judges, and the public, and inadequate sallyports so that prisoners are brought into court from the main streets around courthouses. In addition, many courts have operational problems such as deteriorating heating and cooling systems, courtrooms with severe visual obstructions, and inadequate infrastructure for courtroom technology innovations.

The judiciary's long-range facility planning process provides a systematic method of identifying the need for new courthouse projects. The planning process uses historical caseload data to project court space needs. GAO gave the judiciary's planning process a nearly clean bill of health earlier this year and it won an award from GSA in 1998. If the process determines that a building cannot house projected growth, the judiciary advises the General Services Administration (GSA). GSA determines whether the projected housing requirement should be met through new construction, repair or alteration, or leasing space. The judiciary scores new construction projects based on weighted criteria in order to arrive at a prioritized list of projects. The scoring criteria take into account security problems; building conditions; the number of judges affected by a lack of space; and the length of time the facility has not been able to accommodate additional judges. GSA is responsible for expending funds appropriated by Congress for courthouse construction or expansion.

The new courthouses are generally larger than the existing courthouses, commensurate with the growth in the number of judges and staff, so the amount of rent that the judiciary pays to GSA has been increasing, contributing to the need for additional Salaries and Expenses funds. The judiciary has taken several steps to minimize the rent increases. For example, courthouse construction must conform with the *U.S. Courts Design Guide*, which identifies the functional requirements for courthouses. The 1997 edition defines in greater detail the amount of circulation area needed in order to limit this space; prohibits architects or court staff from adding spaces not contemplated in the design; and encourages shared use of space common to all court offices, such as conference and training rooms. Also, the judiciary adopted a courtroom sharing policy whereby senior judges (judges eligible to retire but who continue to work) are provided a courtroom for 10 years, rather than indefinitely as was the previous policy. This has resulted in a reduction in the number of courtrooms planned for new facilities. In addition, the judiciary was required to adopt a policy to build courthouses large enough to meet its space needs for 10 years, rather than 30 years as was the previous policy. This policy has succeeded as a cost-control measure, but it results in smaller courthouses that the judiciary will outgrow faster. Since it takes as much as 10 years from time of inception to occupancy, a new courthouse is at capacity at the time it opens or shortly thereafter.

TUESDAY, MAY 22, 2001.

FEDERAL COMMUNICATIONS COMMISSION

WITNESS

MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

OPENING STATEMENT

Mr. WOLF. The Committee will come to order, and good morning. We are here today to review the fiscal year 2002 appropriation request for the FCC.

We are pleased to welcome the new Chairman, Michael Powell.

I will not have a formal statement. At this time, we will just recognize Mr. Serrano for any comments.

And then you can proceed. Your full statement will appear in the record, and you can proceed whatever way you see fit.

Mr. Serrano.

Mr. SERRANO. Thank you, Mr. Chairman.

I also would like to welcome Chairman Powell and look forward to his testimony. We have a series of questions, and I know that to certain communities throughout this country, the FCC has become an item of very serious discussion.

I look forward not only to this hearing but certainly to working with you on dealing with some of those issues.

Chairman POWELL. Thank you, Mr. Chairman. It is a pleasure to be here. I am honored for this first opportunity for me to appear before this subcommittee as the new Chairman of the Federal Communications Commission and I feel particularly privileged to do so, seeing as this is the beginning of your tenure as well as the beginning of mine. It is an opportunity for a real fresh start to deal with some of the most extraordinary challenges facing the country in the area of communications.

I have taken the liberty of providing for the record a fairly comprehensive statement about current circumstances in the communications industry by way of background, and to give you a strong and sincere sense of the direction that I hope to take the Agency as we continue to work in partnership for the betterment of our citizens.

I thought, though, I would provide some context before jumping to the numbers, to give you some sense of what we are facing in the communications sector.

In essence, the communications marketplace is marked by four things: change, uncertainty, hopeful promise, and potential danger. This situation is being brought about by one of the most extraordinary revolutions in technology in the history of the world.

In the area of change, we see that beginning with the Telecommunications Act of 1996, we had a decision by the government

to move our industries out of the historical regulatory monopoly environment that has existed for over a century. And that has led to growing pains and challenges for the Commission as it unwinds the legacy of a hundred years of monopoly.

Perhaps the most important change is the confluence of two phenomenal revolutions, the communications revolution and the computer revolution, which is embodied in what we know as the Internet.

When communications begins to be intermingled with computing processing power, you have new possibilities of services that have never been imagined before.

Think simply about the idea of speaking into a telephone in English and having it come out French, or the increased ability to use information processing to bring all kinds of new communications services to the consumer.

And we see them entering the marketplace, not only simple Internet functionality but email, instant messaging, IP telephony, all new advances that have heretofore not been known or understood.

This will create greater choice for consumers but it is also going to create a great deal of anxiety and confusion on their part as well.

Secondly, uncertainty. It is quite clear, to be ironic, that our crystal ball has gotten very cloudy. With advanced digital technology, it is very difficult to predict what the communications space looks like a year from now, let alone five years from now, and it is difficult to appreciate what that means for regulations.

It is very difficult to write rules that have a sound basis on assumptions that will maintain their validity for any length of time.

So we are increasingly being challenged to understand how to make sound, clear judgments and decisions in light of an environment in which we cannot predict with much certainty how the technologies and services will unfold as they go forward.

This is very different than the past that we have experienced—when we dealt with the mature network in which we understood the technologies, and we understood the services being provided.

I also think it is a period of hopeful promise, and this is the rhetoric we hear and the hyperbole we hear, not all of which is incorrect about the new possibilities for our society.

I think that the communication revolution brings new strength and robustness to the economy. The increases in productivity, the ability to drive a healthier economic environment all certainly have been attributed to many of the changes in communications and technology, even despite the current business cycle downturn that many industries in our country are experiencing.

The FCC's portfolio covers somewhere in the neighborhood of 14 to 17 percent of the nation's GNP. That gives you some sense of the magnitude and the importance of our activities.

And it will be new opportunities for our citizens and particularly for our children. The new advanced ways of communicating and providing information provide great educational opportunities—opportunities for inclusion where there has been none before, and great opportunities for bridging differences that have existed and persisted in our society.

And so these promises are hopeful in the new technologies.

I also think, though, that we will face new dangers. The Internet is all things at once. While it may be a library, it may be a bank, it may be a place for commerce, it will also be a crime scene. And it will also be a place where people are defrauded. It will be a place where pornography is carried. The problems and ills that face our society and to which citizens have demanded a governmental response will continue and in a more elusive form than they have ever been before.

So there will be both a curse with a blessing of advancement in communications, as there always has been with new innovations, and those will be challenges to the government as well.

And increasingly, we may see anticompetitive harm. As new technology provides opportunities for new companies to come together in new ways and provide new services, they will present new challenges to anti-competitive concerns and harms in the middle of which we will be stuck.

So, in a nutshell, the FCC is faced with an unprecedented period in which every single area that we regulate is in the midst of probably its most profound revolution.

If you choose television, you will talk about the transition to high definition television, perhaps the most significant change in television in its history.

The rise of wireless mobility and Internet mobility, the rise of competitive environments in the telephone system, and satellites. Space is becoming more cluttered than ever as more and more services are deployed into the orbit.

So this is a challenging time for the Commission as well as the industries we face and it is clear, just as industry and citizens grope with the new realities and the proper business models for this environment, so must the government and so must the FCC.

In the first few months after I became Chairman it became very clear to me that the Commission needed a very sound business plan, if you will, so that it will maintain its relevancy and currency in light of this dynamic environment.

And I hope to make the agency a model of effectiveness, efficiency, and responsiveness. Much of that will involve four basic programs.

We will continually work to develop a clear substantive policy vision to guide our deliberations with greater predictability, so industries and consumers will have a better sense of the direction we are headed.

I think we will have a very strong and pointed emphasis on management and operations to a degree not previously seen at the Commission. I consider that part of my sacred responsibility—to leave an agency that is a model in terms of its operations, its efficiencies and its ability to make quick and meaningful decisions in Internet time.

I think to do that, the Commission will have to have an extensive training and development program that allows our employees and our engineers and our economists and even our administrative staff to increasingly be schooled and educated in the changes that go on in technology and in the market, so that they can maintain their currency and their relevancy.

We have committed to a very serious program, which we refer to as the "FCC University" to provide our employees with life-long learning in the pursuit of their objectives.

We also have an increased recognition that the agency needs an independent, technical expertise. I have been there for three-and-a-half years. I have seen the challenges of trying to review a merger involving the likes of Bill Gates or Steve Case. And at the same time, you are trying to make judgments of the value to the public interest of their combination, you are having them teach you about their technology.

That ultimately is an intolerable situation. The Commission has to be able to scrutinize and make those judgments independently, and so it will endeavor to improve its technical and engineering resources.

And finally, as any agency must to be contemporary, we will look at organizational restructuring and reform so that we are organized in a way that is more fitting of a converged marketplace.

Increasingly our bureaus mimic the kinds of services and products that are available in the economy. That is, they reflect the way that consumers see and hear the new economy. Our new divisions will not be balkanized by technology assumptions of the past.

And that is going to be a big challenge for us.

In short, all of these things are things that we are committed to doing. Many of them will not require more resources, and we understand, as a sacred trustee of the taxpayers' dollars, that we should endeavor to do as many of these things as cost-effectively as we can.

But we do ask the taxpayer to make an investment in their future in this regard, and for fiscal year 2002, we will ask for a total appropriation of $248.5 million. That represents no increase in direct appropriations which will remain at $29.8 million. It will represent a 9.3 percent increase in the use of our regulatory fees which has been a very effective way of funding our operations.

And so with that, I am pleased to be here, happy to have the opportunity to work with all of you, and I look forward to your questions.

[Written statement of Mr. Michael Powell follows:]

TESTIMONY

Of

MICHAEL K. POWELL

Chairman
Federal Communications Commission

Before the

Subcommittee on Commerce, Justice, State, and the Judiciary
of the Committee on Appropriations
United States House of Representatives

On the

Federal Communications Commission's
Fiscal Year 2002 Budget Estimates

Tuesday, May 22, 2001

SUMMARY OF TESTIMONY OF
FCC CHAIRMAN MICHAEL K. POWELL
BEFORE THE
SUBCOMMITTEE ON COMMERCE, JUSTICE, STATE AND THE JUDICIARY
OF THE HOUSE COMMITTEE ON APPROPRIATIONS
May 22, 2001

In order to serve the American public, the Federal Communications Commission, as an institution, must be efficient, effective, and responsive. The challenges of reaching these goals at the Commission are complicated by the sweeping, fast-paced changes that characterize the industries that we regulate. Indeed, the Commission is experiencing a challenge it has never faced—each industry segment in our portfolio is in the midst of revolution, and is attempting to adapt to fundamental economic and technological changes. There are new markets, new competitors, and new regulatory challenges.

Our Fiscal Year 2002 budget reflects the Commission's mission to keep abreast of industry changes and set rational productivity and regulatory goals. We are asking you to invest $248.5 million dollars to ensure that the FCC has the tools to facilitate its reform efforts, upgrade its technological capabilities and further enhance its workforce. My goal is not only to make the Commission an example of efficient management practices, but to create and maintain an employee friendly environment—a place where employees can hone their skills and take pride in their service to the American people, as well as a place where employees have plenty of time to invest in their families. We can work together to encourage participation in telecommuting programs, build internal training programs, and utilize programs designed to lure the best and the brightest to government service. We can do this by purchasing and maintaining state of the art technological equipment to ensure better service to the public as well as a productive workplace.

My request for funding is tied to a specific business plan that I present here today for your evaluation. We have developed this plan along four dimensions: (1) a clear substantive policy vision, consistent with the various communications statutes and rules, that guides our deliberations; (2) a pointed emphasis on management that builds a strong team, produces a cohesive and efficient operation, and leads to clear and timely decisions; (3) an extensive training and development program to ensure that we possess independent technical and economic expertise; and (4) organizational restructuring to align our institution with the realities of a dynamic and converging marketplace.

My goal is to improve the agency on all these levels—and to make many of these changes within the next year. To that end, I have been seeking opinions from a wide range of participants, including Members of Congress and their staffs, the businesses that come before the Commission, consumer groups, and our own skilled employees.

I cannot predict the future, nor can anyone else at the Commission. When faced with future challenges that are uncertain, the best approach is to build a first-class operation, with top talent, that is trained and disciplined enough to adapt quickly to new and changing situations. I hope to build, along with my colleagues and the outstanding FCC staff, just such a unit—one well suited to an uncertain future.

Mr. Chairman, Ranking Minority Member, and Members of the Commerce, Justice, State Appropriations Subcommittee, thank you for inviting me to appear before you today to present the Federal Communications Commission's ("FCC") Fiscal Year 2002 Budget and discuss our priorities for the year ahead.

I feel truly privileged to be here today. I believe that a critical part of my job is to be a leader and steward of the Commission, and I take this responsibility very seriously. In order to serve the American public, the FCC as an institution must be efficient, effective, and responsive. The challenges of reaching these goals are complicated by the sweeping, fast-paced changes that characterize the industries that we regulate. Indeed, the Commission is experiencing a challenge it has never faced—each industry segment in our portfolio is in the midst of revolution, and is attempting to adapt to the most fundamental changes. There are new markets, new competitors, and new regulatory challenges.

Serving as Chairman of the FCC at this juncture in history gives me a unique opportunity to take stock and assess our regulatory framework, and to develop guiding principles that will encourage economic growth in the communications sector. Our Fiscal Year 2002 Budget request represents a critical part of our efforts to make the Commission more cost-effective and results-oriented. Today, I will provide you with a summary of our Fiscal Year 2002 Budget Estimates and discuss our plans for using these funds to enhance the Commission's productivity, and ensuring that we are capable of meeting the future needs of both consumers and the communications industry.

A Fresh Start

I am pleased to note Mr. Chairman that you and I begin this process of reviewing the Commission's budget unencumbered by past concerns and agendas. We have the opportunity to forge a new working relationship focused on the future. I want to state my commitment to working with the Members of this Subcommittee, as well as our authorizers, to develop and maintain a common perspective of the Commission's core mission. Although the Commission is an independent regulatory agency, the assessment, development and implementation of communications policy is a team-effort, with shared responsibilities between the various branches of government. It is my primary responsibility to ensure that the FCC follows its statutory mandates in enforcing communications laws. Indeed, one of my principal objectives is to make the Commission a place of transparent, consistent, and decisive action. This process will necessarily involve reform and restructuring, and I will turn to the other members of the government, as well as outside parties, to carry out our objectives.

Like most of you, I am a parent first and a public servant second. I worry about the impact of my decisions on my two small children, both as an ordinary parent and a federal regulator. What we, at the FCC, do today could affect their quality of life tomorrow. I want it to be a positive impact, not a negative one. When I leave my post, I want the Commission to be an example of how a federal regulatory agency should operate. I intend to leave the Commission better than it was when I got here, to improve its ability to function today, tomorrow and in the next century. Let us take advantage of our fresh start, our new relationship, to implement real change at the Commission.

New Beginnings for an Old Commission

In order to understand our budget request, it is important to assess where we are now, and how we plan to use our resources in the future. The Federal Communications Commission received its initial statutory authorization when Congress passed the Communications Act of 1934. It was a time of severe economic depression—but also of technological change necessitating regulation of the cacophony of voices on the nation's airwaves. The Commission became part of Washington's alphabet soup, and developed a culture and structure designed to handle the licensing of radio stations. When change came in the beginning, it was slow and gradual, from the hardwiring of American homes for telephones, even in rural areas, to the advent of television, and the introduction of cable—these are the issues that the Commission had to deal with in the middle part of the twentieth century. The Commission divvied up the airwaves according to what was seen as the highest and best use of the spectrum and often decided who would receive the spectrum based on the subjective evaluation of the character of the applicants. As valuable as the spectrum was, it was free, with no benefit for its use going to the American people.

The Commission's processes and mission have evolved during the past 70 years. While it is true that we still spend a great deal of time on spectrum management, the number of potential users and uses increases dramatically each year. Instead of primarily focusing on broadcasters and hardwired phones, we concentrate on expanding the spectrum to accommodate new technologies like third-generation wireless and ultra-wideband. Our goals and regulatory mission are defined in a host of adjustments to the Communications Act of 1934, including the Telecommunications Act of 1996. Our responsibility to auction the spectrum is a creation of the

budget and appropriations process, and it currently represents both a mechanism for encouraging competition and a valuable source of revenue for the U.S. Treasury. Today, the Commission's primary mission is to promote a fully competitive marketplace as well as access for all Americans to communications services. We achieve our mission with a combination of manpower and technology—from electronic auctions, to automated licensing, and innovative spectrum management techniques.

No one in 1934, or even 1964, could have foreseen the revolution in communications that we have experienced in the last decade alone. We know that communications developments are not finite and that they will no longer come slowly. The winds of profound and dynamic change, unleashed in part by the 1996 Act, have buffeted the Commission and blown it into a position where its decisions have far-reaching impact on the future of communications, not only in the United States, but also throughout the world. We have come a long way from an agency where the principal focus was the assignment of radio licenses, and its principal activity was conducting lengthy comparative hearings to assign those licenses. This new environment is no longer linear, but chaotic and dynamic. During the next part of this decade, we expect the communications markets to expand exponentially, and develop in a competitive environment that will reduce the need for regulatory intervention and oversight.

This is not your father's FCC, nor should it be. And in thirty years, the Commission will not be our FCC, but our children's FCC. To facilitate progress and not stand in its way, we must review our mission and goals within the confines of Congress' mandate and develop an internal mechanism for improving our ability to foster competition in an ever-changing marketplace. For

this agency to fulfill its congressional charge, indeed to remain relevant at all, it must put together a new business model and build the type of team that can execute it effectively. And with your help, that is precisely what we intend to do.

An Investment in the Future: The FCC's 2002 Budget

Reform takes productivity enhancement, management review and retraining, as well as technological upgrades to integrate all of these facets into a productive work environment. Today, I ask you to invest in achieving these objectives. Our Fiscal Year 2002 Budget requests that you commit $248,545,000 to the future of communications policy. Our total budget request is $18.5 million over last year's appropriation, representing slightly more than an eight-percent increase. This increase is critical to financing programmatic and mandatory costs. The budget also represents a staff ceiling of 1,975 full-time equivalent ("FTEs"). This level includes FTEs funded from both appropriations and auctions resources.

Much of the increase—41 percent—covers uncontrollable cost increases to fund proposed government-wide pay raises, rent increases and other inflationary increases. Specifically, our request includes $6 million for mandatory salary and benefit increases and $1.6 million for Consumer Price Index adjustments in contract services. The remaining portion of our budget—and, by far the most critical—comprises programmatic increases to accomplish the Commission's comprehensive information technology strategic plan initiatives. We are requesting $10,997,000 for these information technology ("IT") enhancements. This amount includes funding for equipment originally scheduled (but not funded) for replacement in FY2000 and FY2001.

We intend to use our requested funding to build upon past improvements. In the past few years, we have streamlined our licensing procedures and implemented electronic filing capability in 78 applications—that is 72 percent of all major information systems. At the end of Fiscal Year 2000, approximately 62 percent of all applications were filed electronically. And, 93 percent of all applicants were acted on within our processing goals. The use of information technology has led to improved processing time as well as a significant decrease in the number of backlogged applications. The failure to invest in our information technology systems, either in the form of lifecycle replacement or technological upgrades, could lead to backsliding in our backlog elimination operations, and undermine our efforts to reform the Commission. It is important, however, that we do not automate what may be a flawed process. I intend to initiate a strategic review of our processes to ensure that they are accomplishing their intended goals.

I am cognizant of the fact that the funds I request here today belong to the taxpayer and not the Commission. For that reason, we ask only what is necessary to maintain and improve the Commission's services and resources. It is important to note, however, that since 1987, the Commission has worked to reduce the cost of government operations by implementing the congressionally-mandated user fee cost recovery programs. The first program, the "Application Processing Fee Program," was designed to recover a substantial portion of the costs of the Commission's application processing functions, which account for the majority of the licensing activity costs.

In 1994, we implemented the "Regulatory Fees Cost Recovery Program." Since that time, we have collected fees to recover the costs attributable to the Commission's competition,

enforcement and public information services. Unlike the Application Processing Fee Program, these fees can be retained by the Commission and applied to obligations incurred during the current fiscal year, thereby reducing the amount of appropriated funds required from the General Fund of the Treasury. Since FY 1994, the fee offset to our appropriation has increased by 37 percent to approximately 87 percent in FY 2000. I plan to maintain that level and even increase it slightly to 88 percent during FY 2002. The actual amount requested by the Commission for the next fiscal year represents $29,788,000 in net direct budget authority since we intend to collect $218,757,000 in offsetting collections from regulatory fees. I am proud of our work in reducing our direct appropriation, and I believe that given the appropriate tools, we will improve on this record.

Keeping Our Part of the Bargain

Almost two months ago, I testified before the House Subcommittee on Telecommunications and the Internet concerning FCC reauthorization and reform. I gave my commitment to following through on the philosophical and practical side of the reform process and asked our authorizers to join me in this effort. Although the financial needs outlined here are an important component of our reform efforts, we already have implemented a management review designed to make the Commission a model agency. I pledge to you that I will use the taxpayers' funds constructively as a way to improve our services—and I provide you with a four point business plan below so that you can evaluate the financial worth of our efforts. Let me emphasize that we are not "reinventing" the Commission, because that would be Congress' prerogative, and until legislation provides us with the ability to reprioritize some of our functions, we will work within the statutory limits set by Congress. My plan is designed to use

our requested funding in a constructive fashion—to improve the management and employment environment in a way that benefits the American people.

FCC Reform: The New Business Plan

I conceive of FCC reform as a comprehensive retooling and redirection of the Commission's entire mission. Our approach is to write and execute a new business plan built along four dimensions: (1) a clear substantive policy vision, consistent with the various communications statutes and rules, that guides our deliberations; (2) a pointed emphasis on management that builds a strong team, produces a cohesive and efficient operation, and leads to clear and timely decisions; (3) an extensive training and development program to ensure that we possess independent technical and economic expertise; and (4) organizational restructuring to align our institution with the realities of a dynamic and converging marketplace.

1. Substantive Vision

The United States has a proud legacy in the area of communications services. This nation built the finest voice communication system in the world, as well as top-notch mass media delivery systems in the form of radio, television, and cable. These systems have reached maturity though—we understand the basic technology and architecture; we largely understand the cost characteristics; and, we understand what the consumer wants and what the product is. And, government regulation and policy had coalesced around these understandings, principally in the form of regulated monopoly and oligopoly.

We are now only beginning to appreciate and deploy the new advanced architectures and technologies of services like broadband. The cost characteristics may differ substantially from those of traditional networks to which we are accustomed. Broadband Internet products are still being developed and we all wait to see what service offerings consumers will and will not embrace. It is a world of dynamic and chaotic experimentation and unpredictable change.

I believe government policy needs to migrate steadily toward the digital broadband future, but recognize that we will be unable to anticipate every change before it happens. I submit that this digital broadband migration should be built around incubation, innovation and investment. At the Commission, our policy direction will focus on this migration and will have several directional guideposts:

- Facilitate the timely and efficient deployment of broadband infrastructure. Endeavor to promote the growth of a wide variety of technologies that can compete with each other for the delivery of content and will strive not to favor—or uniquely burden—any particular one.
- Pursue the universal service goals of ubiquity and affordability as new networks are deployed, and do so in creative fashion.
- Redirect o... focus onto innovation and investment. The conditions for experimentation and change and the flow of money to support new ventures have often been misunderstood or neglected. If the infrastructure is never invented, is never deployed, or lacks economic viability we will not see even a glimmer of the bright future we envision.
- Harness competition and market forces. Drive efficient change and resist the temptation, as regulators, to meld markets in our image or the image of any particular industry player.
- Rationalize and harmonize regulations across industry segments wherever we can and wherever the statute will allow.
- Validate regulations that constrain market activity that are necessary to protect consumers, or we will eliminate them.

- Be skeptical of regulatory intervention absent evidence of persistent trends or clear abuse, but we will be vigilant in monitoring the evolution of these nascent markets.
- Shift from constantly expanding the bevy of permissive regulations to strong and effective enforcement of truly necessary ones. Request Congress' help to put real teeth into our enforcement efforts.

2. Operations and Management

All the vision in the world is useless if you do not build and manage an institution that can execute it. We intend to actively manage the agency. Indecision and avoidance are not legitimate policies and, thus, we will strive to reduce backlogs and put systems in place that will prevent these problems. Managers will be measured, in part, on this basis.

The Commission will develop an annual strategic planning process that will be integrated with the federal budget cycle and the review of our performance as an institution and as individuals. We are working to establish uniform measures of productivity across the agency to facilitate this activity.

The Commission is developing a set of internal procedures that will allow it to function more smoothly. These procedures will cover subjects such as Commission deliberation, voting procedures and internal document security.

The Commission should continue to modernize its information technology infrastructure to ensure productivity gains. We must strive to be a virtual agency—one in which someone in Connecticut is able to access us as easily and readily as someone on Connecticut Avenue. We are working to make this goal a reality through increased electronic access capability. We are

engaged in a time-consuming and expensive project, but one that is critical to our ability to remain relevant in this new millennium. We must continue with due speed to use the advances of technology to our advantage.

We have 18 major information technology systems that incorporate electronic filing or offer public access to data. The industry can file most license requests, equipment authorizations, and comments electronically. A 72 percent electronic filing capability is not enough—we will do better. We administered well over three million licenses last year, so it is critical that we are efficient in this area. It is also important that citizens all over the United States have the ability to contact us easily and from anywhere—whether by computer, phone or letter. Last year, we received well over one million inquiries from consumers. The public must be an active voice in the communications transformation, for they are the ultimate beneficiaries of the abundant choices resulting from full and fierce competition.

Better management and a wider application of technology initiatives leads to enhanced productivity and an improved quality of life for employees. The Commission should be a place to work, not live. Employees should have a fair opportunity to work from home, providing greater flexibility to meet the demands of modern family life. That is why the Commission undertook an ambitious rollout plan for telecommuting last year. We intend to overlay our virtual agency concept to the benefit of FCC staff through an expansive telecommuting program, which is open to nearly 100 percent of the Commission's employees. Approximately 400 of our eligible employees, about 20 percent, have chosen to telecommute on either a regular or *ad hoc* basis. We began the telecommuting program to increase productivity, improve morale, improve

job satisfaction and reduce absenteeism. I am pleased to say that other agencies look to us as a model.

3. Technical and Economic Expertise

Since advances in technology are driving the communications revolution, the Commission must have a strong fluency in the language of technology. We cannot depend on those we regulate for on-the-job tutorials while we make decisions. Over the last six years, our engineering staff has decreased by more than 20 percent. Within the next four years, 40 percent of our engineering staff will be eligible to retire. Conversely, we are not replenishing the coffers at the other end by bringing in new employees. Like other governmental departments and agencies, we are competing for this talent in a tight labor market and are challenged to convince talent to enter government service. This has been most apparent trying to recruit entry level engineers at the GS-5 and GS-7 levels.

To address this situation the Commission is developing an agency-wide "Excellence in Engineering" program. We will examine creative ways to gain greater personnel and pay flexibility to attract technical talent. Increased salaries alone, however, will not do the trick, nor is it the sole motivator for anyone entering government service. While government service in and of itself should elicit a sense of pride, we will increase our technical employees' worth by ensuring that they are able to continue to develop in their field, through strong training and development programs and job rotation. Our laboratory facilities in Columbia, Maryland, need to be upgraded to provide engineers with the tools to engage in critical and challenging work.

It also is vital that we train our non-engineering staff in the areas of engineering and advanced technology. We already have begun to develop an FCC "university" of sorts using our own staff and guest lecturers, and taking advantage of various programs currently available through the government and local academic institutions. We can use this Washington, D.C. location to our advantage and tap into industry and academia. We can use local scholars and have them participate in an educational curriculum, to provide lectures, to provide classroom instruction, to provide counsel and advice.

I am putting similar emphasis on economics and market analysis. These tools are essential to our agency's mission. We have the opportunity to take advantage of both internal resources, visiting experts, and outside educational programs to help not only our economists improve their skills but to help all the FCC's employees understand better the impact of our rules on technological innovations, and competitive markets. It is critical that we look to a plethora of information sources in gathering opinions and forming our policy.

4. Restructuring

Communications policy has been written in carefully confined buckets premised on certain types of technology. The FCC's organizational structure largely mirrors that premise. But the convergence of technology tears down those traditional distinctions and makes it evermore difficult to apply those labels to modern communications providers. In the same way, it makes it more important than ever for us to examine whether those organizational buckets still hold water.

About a year ago, we began breaking down the technology-based divisions with the creation of the Enforcement Bureau and the Consumer Information Bureau. With those reorganizations, we created two bureaus aligned along functional responsibility. We created the Enforcement Bureau to improve the effectiveness of our enforcement activities in an increasingly competitive and converging market. We created the Consumer Information Bureau to enhance consumers' ability to obtain quick, clear and consistent information about communications regulations and programs. These changes have proven to be quite beneficial. As the industry moves toward fuller competition, the missions of these bureaus become even more critical. For consumers to take full advantage of the choices that competition brings, it is important that they have access to information that allows them to make an informed choice. Their ability to easily and quickly convey to us instances where the markets are not providing useful information to consumers in a particular circumstance or with a particular business is our early warning system for market failure or malfeasance on the part of industry players. While the consolidation of these functions is almost complete, there are some additional functions that are transferable into or out of those two bureaus.

We have undertaken a structural reorganization project that builds on some of the initial efforts of my predecessor, Chairman William E. Kennard. Our efforts will be guided by a few key objectives: (1) a functional organization designed along market lines, rather than technical ones; (2) a flatter substantive bureau structure; and (3) greater consolidation of key support functions.

Our program will proceed in phases. We have begun by systematically taking account of the agency's activities and functions to see what is working well and what is not. From that review we will produce a Phase I, short term, restructuring plan and a Phase II, longer range plan. The Phase II plan will consider what wholesale change is necessary and whether it is timely to move away even more from technology-based buckets. We will be looking at what economic or marketplace triggers are indicative of the need for further restructuring. The question has been asked whether the Commission should be aligned along functional lines—e.g., enforcement, consumer information, spectrum management, licensing and competition—given increased convergence in the industry. This question deserves to be asked and answered. But first, we must seek additional and substantial information, and be completely satisfied that it is the right thing to do, before we move to rearrange substantially the organizational structure of the agency.

My goal is to improve the agency on all these fronts. An informed decision, however, is better than one based merely on supposition. We are seeking the opinions and thoughts from a wide range of participants as we proceed down the path of reform. I also look forward to working closely with this Subcommittee and other Members of Congress and their staffs on this matter. It is our goal to fully complete many of these changes this year.

With regard to the organizational restructuring that is likely to be necessary, I hope you will concur in those changes. We need to have the staff and other resources to provide those services efficiently, knowledgeably and decisively.

Conclusion

The primary impetus for my reform program is to ensure that the Commission develops an enhanced ability to carry out its core mission: promoting communications competition in a cost-effective, efficient, and transparent regulatory environment. We are not here to find a solution to every problem related to communications. We cannot handle everyone's telephone bill, review every cellular tower siting, or ensure that everyone in the United States has access to the most expensive equipment in his or her home. We can promote an atmosphere of competition where we step into the picture to ensure fairness of process, to stop predatory and anti-competitive behavior, and to make certain that the airwaves are free from clutter and pirates. We can and should make certain that the public interest and public safety are protected, while recognizing that we must work within the four-corners of our statutory mandate.

I cannot predict the future, nor can anyone else at the Commission. When faced with future challenges that are uncertain, the best approach is to build a first-class operation, with top talent, that is trained and disciplined enough to adapt quickly to new and changing situations. No army, for example, can know in advance what it will find when it engages on the battlefield. The fog and terror of war never afford the luxury of predictability. The key to success is to have a force that is well-trained in tactics, strategy and the weapons it will need. A force that is disciplined and able to adjust quickly and adapt to fluid conditions—threats and opportunities both will present themselves through the haze. I hope to build, along with my colleagues and the outstanding FCC staff, just such a unit—one well suited to an uncertain future.

Thank you. I would be happy to answer any questions this Subcommittee may have.

BIOGRAPHY OF CHAIRMAN MICHAEL K. POWELL

Michael K. Powell is Chairman of the Federal Communications Commission. He was sworn in as a member of the Commission on November 3, 1997. He was designated Chairman by President Bush on January 22, 2001.

Mr. Powell, a Republican, was nominated by President William J. Clinton on July 31, 1997, and confirmed by the United States Senate on October 28, 1997.

In addition to his normal duties, Mr. Powell serves as the FCC's Defense Chairman and is responsible for overseeing all National Security Emergency Preparedness functions for the Commission. He also served as the FCC representative to the President's Council on Year 2000 Conversion which was established by President Clinton on February 4, 1998, to address the Year 2000 computer problem.

Mr. Powell previously served as the Chief of Staff of the Antitrust Division in the Department of Justice. In that capacity, he advised the Assistant Attorney General on substantive antitrust matters, including policy development, criminal and civil investigations and mergers. Prior to joining the Antitrust Division, Mr. Powell was an associate in the Washington, D.C. office of the law firm of O'Melveny & Myers LLP, where he focused on litigation and regulatory matters involving telecommunications, antitrust and employment law. Mr. Powell graduated from the Georgetown University Law Center following which he served as a judicial clerk to the Honorable Harry T. Edwards, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit.

Before attending law school, Mr. Powell served as a policy advisor to the Secretary of Defense on matters involving the United States-Japan security relationship. Mr. Powell's experience also includes military service as an armor officer in the United States Army. He spent the majority of his active service with the 3/2 Armored Cavalry Regiment in Amberg, Germany, serving as a cavalry platoon leader and troop executive officer. While on duty, Mr. Powell was seriously injured in a training accident and, after spending a year in the hospital, was retired from service. Mr. Powell graduated in 1985 from the College of William and Mary with a degree in Government.

Mr. Powell currently serves on the Georgetown University Law Center's Board of Visitors and is also a 1999 Henry Crown Fellow of The Aspen Institute.

Chairman Powell is married to Jane Knott Powell. They live with their two children, Jeffrey and Bryan, in Fairfax Station, Virginia.

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BUDGET INCREASE REQUEST

Mr. WOLF. Thank you.

When you talk about your resources, your request represents about an eight percent increase in spending in a year when President Bush has requested that non-defense programs across the board receive closer to a four percent.

What circumstances do you think exist at the FCC which would put you in a situation that the FCC should have a larger increase than most other agencies?

Chairman POWELL. Well, I certainly cannot make complete comparisons with the value of the request of other agencies, but I will say the Commission is faced with a relatively dire situation on the IT and technical capability front, which I mentioned.

As I said in my opening statement, we represent a substantial part of the regulatory oversight of the economy, somewhere in the neighborhood of 14 to 17 percent of the GNP, and I think out of years of laxity, we face what is almost critical problems in our technical environment.

For example, just in the area of engineers, which we compete for in the same labor markets as do advanced companies, we have 30 percent who are eligible for retirement. That number will move to 40 percent relatively rapidly, and the attrition is phenomenal.

We are unable to replace them at the same speed as we are losing them, and I think that the public interest is going to be sorely underserved if that is not stemmed the tide of that is not stemmed.

I also would emphasize that, as an agency that is substantially dependent on fees, we have carefully ensured that this could be done without a net increase of the burden the taxpayer directly through appropriations and only through an increase in our offsetting collections of fees.

BROADBAND INFRASTRUCTURE

Mr. WOLF. Of course there are a number of other agencies that could basically say the same thing. The IRS could say the same thing. Customs could say the same thing.

In reading your statement, with your plans to move the FCC forward, you suggest a four-point approach to the plan, beginning with a need for a clear policy.

The overarching theme appears to be to move the industry towards digital broadband future.

What does it take to facilitate the deployment of a broadband infrastructure, and how do you propose to accomplish this policy?

What are you going to do?

Chairman POWELL. Under section 706 of the Communications Act, the Commission has an obligation to continue to evaluate the pace of advance service deployment, and we do that in a number of ways.

The first thing we do is remain very vigilant about what the conditions of deployment are. The Commission annually evaluates and studies the deployment of advanced services and accumulates that knowledge in the form of a report that it submits to Congress at the end of the year. That helps us identify what the pace of deployment is, and what the obstacles to that deployment are.

And that allows us to soberly evaluate whether there are places in which the government can make a meaningful contribution to the increased timeliness of that deployment.

So I would not minimize the importance of continued observation, study, and information collection. It is also material that is used by any number of agencies, as well as the private sector, to consider what their alternatives are.

Secondly, we are very committed to the universal service programs which are embedded in the telephone fee collection system in a way that we are able to provide subsidization for a lot of infrastructure so that many of the services, or at least the telecommunication infrastructure on which these services depend remain ubiquitous and affordable to all Americans.

The universal service fund is a significant component to making sure that rural parts of the country or parts of the country that have very high cost dynamics nonetheless have the right amount of subsidization to afford those services.

We also have a series of proceedings that are about reforming and continuing to assure that the universal service component remains strong, and the goals of ubiquity and affordability are maintained.

And then finally I would say there are a bevy of areas where we are considering what is the right regulatory environment that actually encourages investment in advanced architecture. The advanced architecture will be an extraordinarily expensive undertaking to roll out the kinds of fiberoptics and advance systems that are necessary to provide these services.

I think the government, more than ever, has to learn about what are the regulatory environments that cause money to flow into those endeavors. I think there are any number of things that we do, for example, eliminating regulatory arbitrage opportunities where because of the quirks of legacy regulation, companies enter markets not for the efficient deployment of new services, but often to take advantage of loopholes in the legacy regulation that allow them to gain super economic profits in a short term, and I think ultimately not to the benefit of consumers.

And so we have a whole series of proceedings trying to rationalize rules that were essentially written in the telephone era world, so that new entrants will have an incentive to deploy the new, modern, advanced architecture, as opposed to take advantage of short-term opportunities in the old.

Mr. WOLF. This is a budget hearing, but there will be a lot of questions that are non-budget questions.

I think it is fair to say, then, that most of what you are talking about will probably cost more money. The Committee should not look for any savings with regard to that. It is more of an aggressive approach, and with the costs justifying the eight percent or nine percent as the out years go out, perhaps more and more as we go out.

Is that correct?

Chairman POWELL. I think so, Congressman. I think that one of the things that we have committed to as a nation, particularly embodied in the 1996 Act, was to undertake an extraordinary effort,

to reverse a regulatory environment for the good of the economy that has existed for a century.

I think that is cost intensive. It gives the FCC a central role in this economic revolution in transitioning that environment. And I think that we can be very cost effective about it.

I think that we can maintain only steady increases, as opposed to dramatic ones, but I think where we do identify shortcomings that really are going to reflect on the public interest, we have to be candid about those and be willing to invest in them.

RECRUITMENT AND RETENTION

Mr. WOLF. Tell us a little bit about the recruitment and the retention. You mentioned it briefly.

Where are most of your people going that are leaving? Those that are not retiring, those who are leaving, where do they go?

Chairman POWELL. It is a great question. The FCC is challenged because the subject matter we deal in is quite lucrative.

Mr. WOLF. Yes.

Chairman POWELL. It is amazing we keep anyone at the FCC. And sometimes I wonder how we do. But a good number of them have an extraordinary number of options available.

We are regularly raided by corporate America, someone who develops expertise in the telephone area very easily finds himself leaving the Commission to work for one of the major telephone companies.

A lot of them have been attracted by many of the new entrants, start-ups, dot.com type companies. It is a little less so right now but we have often had people lured away for that reason.

And, you know, ironically, with respect to attorneys and certain other professional disciplines, we seem to be able to do all right. We are able to attract talented people and replace them because they see the value of public service, which I think is enormous.

The greater challenge comes with the kind of specialties or technical expertise that the AOLs of the world want just as much as we do.

Mr. WOLF. Such as what? What jobs?

Chairman POWELL. A perfect example would be an entry level engineer who is critical to understanding issues of technical interference and spectrum management. We talk about things like lower power FM radio services and new advanced satellite services.

One of the big sets of questions increasingly is, can that service exist without interfering or causing technical problems with existing services.

This is something that very few lawyers at the agency are going to be capable of resolving.

Also, because technology can be advocated to us, various sides will say that it cannot exist without causing interference; other sides will say that it can, and having the kind of entry level and junior engineer who is able to do that sort of work and resolve that is a difficult person to attract at GS–5, GS–7 levels.

Mr. WOLF. How many vacancies do you have now?

Chairman POWELL. I do not know what our total vacancies are against what we are authorized. Sixty vacancies? About 60 vacancies.

Chairman WOLF. Is that higher than normal or is that about what it would be for this time of the year?

Chairman POWELL. I think it is higher than normal, we are being told.

Mr. WOLF. We had a job fair in my district at the CIT center. Did the FCC come? Did you find anybody there that you felt was good, because there are opportunities out there.

We have urged other agencies that are going through hiring problems, particularly with what is taking place in the economy here and other places—this is an opportunity.

I found a lot of people were excited about moving into government service, and I think government service is more than just being paid a lot of money. But the opportunity—as a young person to be involved in an issue that, if you were out at a high tech company, you may not get involved in, to make an impact and a difference—is very exciting.

That is the same with regard to lawyers. A young lawyer at the Justice Department works on cases that, if he were at Akin, Gump, his name would never surface. And so here is an opportunity I think for public service. So I think you should be aggressive.

That was a short-term job fair. There are many more. We also have a list of all the companies in my area and also Mr. Davis' and Mr. Moran's, who are laying off and have laid off workers. You might want to contact my office to get that list and go out because I think most of the companies would certainly want to help their employees who were faithful and had worked there.

Are you asking for any type of legislation with regard to payment, like the SEC has?

Chairman POWELL. Payment flexibility? We have considered legislative proposals and I think that we have even drafted a potential proposal that allows some personnel flexibility.

I do not know that I would characterize that we have formally requested it. But in discussions with people who have been interested in the engineering deficiencies, we have been asked about what legislative changes would be permissible.

I am not that familiar with the specifics of what the SEC has, but as we have discussed in your office, I think there really are opportunities in working with the Committee to try to find personnel flexibility to help with that.

Mr. WOLF. How long does it take to bring somebody on from when you begin? You do not have to go to OPM? Is that correct?

Chairman POWELL. We do. We have our own hiring authority but I think at certain levels, we do get, depending on the personnel category that they are being appointed to, we do have some OPM approval, don't we?

Mr. FISHEL. We have delegated authority from OPM to do most of the hiring that we need to do.

Mr. WOLF. Do you have the authority to offer a higher salary, to break out of the GS–5s or GS–6s, whatever the case may be?

Mr. FISHEL. On a limited basis within the grade, we can do advanced steps but not to disregard the pay schedule, no. To get advanced hire for background and experience.

Mr. WOLF. Do you have that for senior positions too?

Mr. FISHEL. On a very limited basis.

Mr. WOLF. Several years ago, when I was with the Transportation Appropriations Committee, we gave the FAA that ability, in procurement, but particularly with regard to hiring to go out, because of the technical nature of the work. And you are in a similar situation. Obviously, skills you have at the FCC would be different than maybe if you were working on marketing orders at the Department of Agriculture.

So I think the Committee would be willing to help you, certainly on a one-time basis, if you needed that, to go outside the normal hiring process, if we had the approval of the authorizers.

I have a lot of other questions, but I will recognize Mr. Serrano.

SPANISH LANGUAGE RADIO AND TELEVISION

Mr. SERRANO. Thank you, Mr. Chairman.

Chairman Powell, to use a radio and TV term, before we get to our regularly scheduled set of questions, coming in this morning I heard on the radio two items that caught my attention. They both have to do with Spanish radio and TV.

One of them is that Univision has been okayed to purchase I believe it is 13 TV stations from one of the quote unquote lesser networks. I do not know which one it was, UPN or WB.

Could you tell me something about that? Will these be Spanish language TV stations or is it just that they are purchasing stations? Not just. That is a pretty big deal.

Chairman POWELL. Yes, Congressman. I am sorry I am not particularly familiar with the specifics of that transaction. I would be happy to find out for you, and I do not know whether there is anything in the Commission precedent that would mandate the continuance of Spanish language programming, although I will say that the growth of Spanish language broadcasting stations has been extraordinary. We have seen really phenomenal growth in Spanish-oriented programming throughout the country.

And indeed, when you factor that into the level of diverse programming that is going on in the country, it has contributed a substantial amount.

Univision is just one of the many who have proved to be very, very successful and commercially viable in providing those opportunities.

But we will be happy to find out the specifics.

Mr. SERRANO. Please. I would appreciate that because that was a big item this morning, both on Spanish radio coming in from New York and on local radio.

The other thing is that I sometimes wonder—and I am not trying to suggest that you do, but I do not know—what advocacy role the FCC can at times play.

The good news about Spanish TV is that it is growing and it serves the community well. The complaint, in many cases, is that the programming, most of it, comes from out of the country, and that there is no opportunity for local producers and local artists—local meaning the 50 states and the territories—to be seen or to have their products seen, their artistic products seen.

Does the FCC take that into consideration when granting licenses and allowing sales and so on?

Chairman POWELL. Probably not to the degree they are suggesting. There are few, if any, regulatory rules with regard to the content selection of a broadcaster.

Interestingly enough, there are some in the context of cable television and multi-channel, at least not as to what the nature of the content is, but an opportunity for alternative sources of content.

We do have policies under the Public Interest Standard that are designed to emphasize localism in terms of the community of license. But we also have a pretty significant upper limit with respect to the degree to which we can dictate editorial or content choices under First Amendment jurisprudence.

Often at times when we have moved in that direction, we have been quickly rebuffed by the courts. So we walk a fine line with broadcasting between trying to make sure that broadcasters serve their local communities and they have locally-oriented programming. But there is very little that could specifically dictate the source of that programming or the nature of it.

It is important to recognize our regulatory authority runs to the distributor—the licensee—not to the program providers themselves, so it also sort of cuts us off to some degree on our ability to influence the kind of programming that is actually produced or where they come from.

Mr. SERRANO. Right. I suspect that with these questions and my next question, a lot of it may require our ability to talk to your folks later, just to get a clearer picture.

I am not suggesting at all that we tell people before we issue a license what they have to put on the air, but you know, the good news is that this Hispanic market, which is fueling all these purchases and sales, has a lot of local talent amongst its ranks.

And yet, if you happen not to be from one of those communities or living out of the country, you may not end up on one of the soap operas or one of their shows. And it is kind of ironic because these folks come here from these countries. They then create the market which allows for the sale and purchase of these stations.

And then, unless they go back home, they probably will not get on one of the programs to show their talent.

Chairman POWELL. That is right. I am somewhat familiar with the situation, having read about these controversies, particularly the soap operas and the selection of artistic talent, and I think that is probably a very real problem. I think it is probably one outside of what we reach but I do think that we could give you a pretty solid understanding of what the parameters are of the licensee's obligation.

Mr. SERRANO. Right. And I would like to do that because I am sure that there are ways within the law that you could make friendly suggestions to people as they come on board.

The second item I heard was an interesting one. In LA and in New York, to mention two, and I think Philadelphia, also, for the last few months or years, Spanish language radio stations are now number one. In LA, number one, number two, and number three, the top three stations in listening audience.

And yet when it comes to billings and ads placed by corporate America, they are number 20, 22 in those markets. And enough studies have been made by advocacy groups to indicate that a lot

of those folks in corporate America have made conscious decisions not to advertise on some of these stations.

My staff calls that foolish investment practices that eventually will catch up to them. But again, within the scope of what you can do legally, is there anything folks can look at as to why this disparity?

If these stations had no audience, you could understand why they may not be making the money other folks are making, but they now have the audiences, and yet they cannot get those folks to advertise.

Chairman POWELL. The long and short of it is, we have seen that problem before. We have seen that with the black community as well. There have been efforts in the last couple years to study those practices and at least put a spotlight on them.

There are two dimensions to it really, the actual advertising practices component is probably vested at the Federal Trade Commission and they have been partners of the Federal Communications Commission in working through the studies and development partly out of the recognition that the statute specifically excludes the FCC from advertising and advertising practices and the FTC has that squarely within its jurisdiction.

And so we have worked with the FTC in a partnership. As you mentioned, your advocacy component spotlights that to the extent that someone has actual authority to take action. In furtherance of that, I suspect that rests there at the FCC.

Unless it rises to the level of actual civil rights discrimination, which I think is an entirely different set of questions that could be raised in some context. Then you are talking about the civil rights authority of either private action lawsuits that are available or the Department of Justice's authority under Civil Rights statutes.

But there certainly are places in the government at large that have some components of this issue. I suspect that the most central one is the Federal Trade Commission.

Mr. SERRANO. Right. Just before I close on this issue, I remember that when I was much younger, whenever we in the Hispanic community complained about equal and fair treatment, the comment was always, well you guys do not have the numbers. You happen to be in one of the few agencies where the numbers are there. TV stations, radio stations, the ratings indicate that.

And so I would like to meet with some of your folks to see what, within the law, can be done just to, if nothing else, spotlight this, really highlight it and show people that there is a disparity here. You can see maybe why Rolls Royce does not want to advertise in the South Bronx or in East LA maybe, but certainly Coca Cola and Pampers and other products.

I mean, Goya knows it well and Goya advertises 24 hours a day. So what is wrong with the other folks?

But I thank you for that, Chairman Powell, and I hope we can get together and talk about that.

Chairman POWELL. You are welcome Congressman. We will do that.

DIGITAL DIVIDE

Mr. SERRANO. Chairman Powell, as you know, I am keenly interested in the issue of addressing the digital divide, making sure that technological breakthroughs provide as much promise to the underserved communities as they do to wealthy communities.

What do you see as the role of the FCC in addressing the issue of the digital divide? How do you plan to use your position as Chairman to ensure that we are doing everything we can to narrow the divide and make sure all people have the same access to technological advances?

Chairman POWELL. Well, I would begin by saying that the Agency has a long-standing commitment to ubiquity, affordability, that is for all Americans, affordable prices, and it continues to be guided by that policy.

And it is embodied in the statute which we steward.

I also think that we have a lot of reasons to be very optimistic about the deployment of advanced technologies to all Americans, and I would submit at a much faster rate than we have ever been able to deploy similar innovations, whether that be electricity, the telephone system itself, television, cable, water, plumbing. None of them have progressed at the rates that we are beginning to see in the area of advanced technologies.

I will give you an example: Internet functionality, which really became commercially available around 1995. As of 1999, 90 percent of all Americans had access to the Internet from at least ten ISPs or more.

That is an extraordinary achievement in a short period of time in the regard to narrow band infrastructure.

With regard to broadband infrastructure, currently about seven percent of all Americans have access to high speed broadband functionality, and it continues to grow at almost triple digit percentages.

So we have a lot of reasons to suspect that these technologies will get to communities.

Last time I looked at the statistics, there was some form of broadband being offered in every State of the Union.

The other reason I am fairly optimistic about this is that there is something very different about broadband deployment than there has been about the other kinds of systems we have deployed in the country.

The telephone system reaches virtually all Americans—94 to 95 percent. There is some confusion about subscribership versus access.

The cable system, for example, reaches 98 percent of all homes in America, and that is regardless of location, or social demographic class.

What is happening with broadband is it is being layered on top of these existing infrastructures, so some of the most thorny problems have presented themselves in telephone and in electrification. We are going to be able to limit those burdens in the context of broadband because we are going to upgrade on top of systems that already reach people, which is usually the toughest part of making sure that everybody gets access.

I also think the E-rate program has been extraordinarily successful in making sure our children have access and rural health care providers have access.

I just had the school numbers on the top of my head but something like 95 percent of all public schools are now wired to the Internet. Sixty-three percent of every public classroom in America is wired to the Internet and that program continues. This is an important program for that component of broadband functionality.

Besides that, in the context of the reports I mentioned, we regularly evaluate to see where we are finding broadband deployment bump into a wall and seeing whether that wall is something that we can remove through regulation or removal of regulation, the barriers to its deployment.

That often involves whether services can be deployed cost effectively. Regulation introduces all kinds of skewed judgments about costs. And sometimes we can rationalize those, we can incent people to deploy advanced services.

One quick example. We recently reformed the high cost support for rural telephone companies, many of which were complaining that without those reforms, they did not have the incentives to invest in broadband infrastructure in those rural parts of the country. And part of what we were cognizant of in reforming the rules was to remove those impediments for investment and hopefully break open the bottleneck of investment in rural America.

I think many cities in urban areas will have bright prospects, given the tele-density. It is very cost-effective in the city environments, and many of the infrastructures, like cable, are extremely popular in urban environments and will provide a rich opportunity and we see that. We see that companies are building in those environments.

Mr. SERRANO. Well, I will grant you that we have seen a major dramatic change in the availability of these services in our communities, but I think the numbers may be misleading.

If you say 65 percent, for instance, of all schools are connected, you might find a lot of districts where it is 100 percent, and then others which are much lower, making up the 65 percent.

And I am still wondering, I have always felt that the FCC should play—and I felt this during the last Administration also—should play a more active role in sort of reminding some people of their social responsibility, which eventually is good business.

I remember for instance, in the Johnson and Nixon Administrations, whenever housing was built in the Bronx, there was always some agreement that the person that came and built the housing, the private contractor, the developer who built the housing, would also build a community center, or would also build an annex to a school or something, as part of the fact that they were the ones being given the opportunity to build this large project.

And I am wondering if, as we get more and more folks who make a lot of dollars in this society in this area, if we can sort of encourage them in a friendly way to do some more things for communities, not only in the cities, but in rural America and those areas.

Because you know I visit schools in my district, and I see that there is a real awakening to this whole issue, but we are still so far behind what is happening in other places.

One last point. Granted that cable TV is an example of how well new technology can reach to other countries, but remember that before there was cable TV just about every American had a TV, so it was a matter of just another way of watching TV.

The computer age and the Internet were something totally new that came in from day one as a whole new item in the house or in the school, and we have to spend more time trying to figure out what is the best way to reach everyone.

And I would hope you would consider that in your deliberations for the next four years.

Chairman POWELL. Absolutely. And I would emphasize that we do engage in that encouragement role. For example, last year, the Commission held a series of hearings all around the country in which individual Commissioners chaired conferences focused on community development and advanced broadband infrastructure.

I personally hosted one in Lowell, Massachusetts for the New England part of the country. We brought in community groups and organizations and we examined what the state of broadband deployment was in those areas and what we could do to improve them.

And what happens a lot of times is really extraordinarily creative ideas emanate from the communities themselves about how to aggregate their buying power, how to facilitate the removal of local zoning restrictions and things that are often barriers to the deployment.

So I hear your point, and I would submit that we recognize that and we have, within certain parameters, been willing to do that and have done so fairly aggressively, at least over the last year.

And that does not even highlight the enormously good deeds of local franchise authorities all over the country. Cable is franchised locally. The local governments have central responsibilities at the local level. We have seen a lot of activity on their part as well.

STAFFING AND CONTRACTING

Mr. SERRANO. Mr. Chairman, I want to ask one more question, and then I will give up the mike for other folks, and then we will get on to the second round.

Commissioner Powell, in prior fiscal years, the FCC sought, unsuccessfully, authority for a special employee buyout initiative in an effort to try to ensure the right mix of skill sets among FCC employees.

What is the current status of FCC staffing issues? Do you have the right mix of people in place with the right technological skills to carry out your mission?

And to what extent does the FCC rely on contract employees to carry out its mission?

Are there limitations to your ability to rely on contractors?

Chairman POWELL. Well let me answer most of that, and maybe for some of the specifics, Andy Fishel can fill in for me.

My view is that we currently do not have quite the right mix. Meaning, I think that, for example, among the two central professional classes, we are a little more heavy on the attorney side and less on the engineering and technical side. I think that is natural.

I think that in the wake of the 1996 Act, there was an extraordinary amount of legal work to be accomplished in promulgating the rules associated with the statute. I do think that that process has begun to mature and now we are focused more on the forward looking dynamics which I think are really challenging technical questions.

So a lot of our talk about engineering in excellence is designed to reevaluate that balance and try to do all that we can to correct it. And so that really is a central objective of mine, as the leader of the Agency.

I think we have so far only had modest success but I also think it is fair to say that we have not previously identified it as such a high priority and seen the criticality of it that we do now with the emphasis that we are putting on it.

Andy, are there any specifics on the buyout that you wanted to add?

Mr. FISHEL. Just this. As we look at flexibility buyouts as well as early-outs, those are factors we took into account in the past and are likely to do so again as we try to establish the right balance of employees in the agency.

Mr. SERRANO. Thank you. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Taylor?

SPECTRUM AUCTIONS

Mr. TAYLOR. Mr. Chairman.

Mr. Chairman, welcome. It is hard for me to criticize or even challenge an agency that is going to bring in $4.3 billion for the American taxpayer.

We thank you for that effort.

I would—of course last time I had some exception about the move of the Commission to the Portals Building and about what motivated that.

But what I am interested in is not involved with the appropriations process now. It's the spectrum auctions that we have experienced—and of course starting with the 1997 Budget Act—my district, which is a rural district, hardships on several family-operated stations.

WZLS–FM is a radio station that is owned by the Lee family. They had virtually been licensed. Of course case action put that on hold. Then they had to go bid, and they were the third highest bidder for a permanent license to continue. They were unable to raise the kind of money that two heavily funded out-of-the-area investor organizations raised to bid on the station.

Now this is a known case that is going on, so I am not going to ask you to comment on the case itself. What I would ask you to think about and maybe under a solution.

Are we simply encouraging market concentration in the telecommunications area by awarding a license to the highest bidder, what is to become of the mom-and-pop operations in the small communities especially, or the wireless telephone companies that are trying to get off the ground? They cannot compete with the kind of capital that can be raised in metropolitan area being inserted into the rural area to control the market.

Is anything being thought about in that area?

Chairman POWELL. Well, a couple of clarifications about the spectrum laws, just so we are on the same sheet of music.

The Commission has virtually no discretion any longer under the statute not to auction licenses. And we are certainly happy to talk to you about what the consequences of that are, but interestingly enough, satellite spectrum cannot be auctioned.

It is exactly the opposite in the case of broadcasting. The vast majority of broadcasters, television and radio in this country, did not obtain their spectrum by auction. They were awarded it long ago under a comparative hearing or other kinds of allocations that did not involve cost. And Congress was thoughtful to modify the statute in a way that there was a high renewal expectancy.

What that means essentially is when those licenses come up, those broadcasters have a reason to expect renewal almost automatically save some grave failing that almost rises to the level of criminal activity. And so the vast majority of broadcasters will not be in a position of having to purchase licenses upon renewal and will in essence have them in perpetuity, unless there is some statutory change, they will maintain those licenses without having to pay an auction for them.

When you get to wireless services of the newer variety like mobile telephones, advanced services, there is no question that there is an extraordinary capital cost associated with the acquiring of licenses. But I think it is fair to note that in many ways that was always the case. Because what used to happen is—and I think this is what Congress recognized—that people would get spectrum for free and that it was sold in secondary markets for the same prices that we could have obtained up front, and the only difference was, private people got the money and not the government.

And I think that the government in my estimation is wise to have reasserted its own ownership rights in the spectrum and made sure that the taxpayer generally gets the benefit of those transactions as opposed to private actors who got the spectrum free in the first place.

Does it have an effect that you describe?

Unquestionably, the communication markets are becoming a very expensive business to participate in. I could not disagree that there will be aspects of that.

I think the majority of them will be very, very positive for consumers. But I do agree that there are going to be examples of a lost past where there are stations and others that are unable to keep pace with the relentless development in the incredibly lucrative communications marketplace.

When I talk about this with friends, I often talk about it—it is kind of like the Wal-Mart problem. You know, Wal-Mart in some ways has certainly challenged, if not eliminated, many small retail hardware kinds of operations.

Now consumers have arguably more choices at lower costs inside a Wal-Mart, but there is something probably lost by the absence of the corner hardware store which provided a certain value to people.

But it is very difficult for me to see as a regulator how you could completely stem that development, which has certain evolutionary characteristics.

The other thing I would say is I do not think that the government, including Congress or the Commission, has been naive to this concern. And indeed, we have an obligation under the statute to try to find ways to lower the cost for smaller, more entrepreneurial entrants in the form of bidding credits and other kinds of devices that are designed to not completely but partially mitigate the enormous prices paid by providing for designated entities an opportunity to get their license at slightly less cost than a larger carrier would.

PAY TELEPHONE ACCESS

Mr. TAYLOR. It is not just nostalgia that I am talking about. And I recognize the statute and your limitations. I would be glad to talk perhaps at a later time about what might be done.

It is what impact the spectrum auctions are going to have on the rural and underserved areas and what we can do to meet that need, which brings me to a second question, Mr. Chairman, if I may.

Pay phone access in North Carolina—now I have written the Commission earlier on behalf of the Eastern Band of the Cherokee Indians who are seeing many telephone pay phones disappear from locations throughout the reservation there contiguous to the Smokey Mountain Park, and a lot of the reservation is separated by large government tracts and it is not an urban area in any way.

And, of course, throughout America there are over five-and-a-half million families that are without telephone service, and of course about 30 to 40 percent only have wireless service.

And what I really want to focus on is—of course, some of the companies have said the pay phones are totally unprofitable and they are bringing that to an end. And that is an area where I hope we can focus some attention to serve families, whether it be rural or maybe even in urban areas if the practice continues. So I would appreciate some comments on that.

Chairman POWELL. Yes. We have recognized that the pay phone industry in particular has been under a great siege for a number of reasons.

But certainly one of the most critical is the rise of wireless services that have eaten deeply into the use of pay phones in lots of markets and I think unfortunately start to erode the total economic viability so that places where it is probably still very central and important it is difficult for those operators to maintain a service just for those areas, given that it is being severely challenged by wireless functionality.

The Commission has taken up a number of pay phone proceedings and completed them in an effort to provide more economic rationality. Indeed, I remember your letter and I remember I think Mr. Kolbe was also a signatory. We acted, you know, soon after I came in, we quickly acted on what I think is the most contentious aspect of pay phones—long distance carrier compensation for calls.

We finally finished that rulemaking I believe in March or maybe early April. I think that is the one that pay phone providers were most centrally concerned about getting some clarification on, and I am proud and glad we got that out.

Hopefully, that will make a significant difference so that people do not have interruptions in their compensation that make it difficult to run a business.

There are a number of smaller proceedings that we are moving quickly through as well out of recognition of the situation you have described.

Mr. TAYLOR. Thank you, Mr. Chairman.

Chairman POWELL. You are welcome.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. WOLF. Ms. Roybal-Allard?

Ms. ROYBAL-ALLARD. Welcome, Chairman Powell.

Chairman POWELL. Thank you.

LAND-BASED WIRELESS TECHNOLOGY

Ms. ROYBAL-ALLARD. In last year's appropriation bill, the Subcommittee directed the FCC to—and this is a quote—"take all actions necessary to complete the processing of applications for licenses", end of quote—for services that would bring local channels to markets that DBS could not.

And I understand that no companies have received licenses as a result of this directive, even though at least one company, Northpoint Technology, was ready to provide the services and had applications on file.

Could you describe the land-based wireless technology service and whether you are satisfied about the arguments about interference or the need for auctioning—whether those concerns have been answered?

And also what is your timetable in complying with the Committee's directive?

Chairman POWELL. I would point out the other thing the statutes did was mandate a third-party technical testing, which has been an extraordinary undertaking, to ensure that the technical interference considerations have been fully vetted and considered. We are very close to the end of that process.

The report has been submitted as our procedures and policies require. That was put out for public comment. We have received public comment.

I think reply comments are due tomorrow, I think, on May 23rd, which will finally close the record on the technical questions so that the Commission's engineers can then complete the process, as they have been doing. We then will be able to have a complete record to sort of finalize their evaluation of the engineering questions so that it can make a sound judgment about technical interference.

This is actually a perfect example of the kinds of issues that are increasingly requiring independent expertise.

I would also point out something which is often underappreciated, that there is almost another set of problems we have to work through that are just as significant as the technical interference question, and this is another classic example of convergence. And it allows me to describe the service as you asked.

The service is terrestrial at base, meaning it is a land-based wireless service. It will compete against a service that is satellite-based—direct broadcast satellite television, which we think is won-

derful—that is a healthy thing to do. It provides an opportunity for competition, service in rural areas, all those wonderful things.

The interesting thing, though, is that they are companies of two different characters that have different regulatory responsibilities.

For example, under the "orbit" statute, we cannot auction spectrum to satellite providers. Direct broadcast satellite companies do not have to pay for licenses at auction. Terrestrial companies, however—must do so under the statute.

So there is a real complicated set of issues here that we will have to work through, because Northpoint is a terrestrial provider that has filed in a satellite window.

There is going to be a set of legal issues that we have to resolve about whether they are going to be permitted to have a nationwide license on an exclusive basis and not have to pay for it at auction, which is I think understandably what they would prefer.

They have spent a lot of money developing their technology. They are certainly, as I understand it, ready to act on that.

But we are very cognizant of that. We are very anxious to complete it as much as anyone. But I think that sometimes this component of the problem is undersold. I think that as soon as the technical part is done, that is the prerequisite, I do not think that is the hardest part. I mean, I think that we will work through the numbers and reach a conclusion.

I think then we will have to wrestle with whether Northpoint's application is mutually exclusive, which means if they are the only ones, then it is possible for them to be licensed without auction. If they are not, in the sound judgment of the Commission, we are compelled by statute to allow other people who want to provide a similar service to have that opportunity as well.

So this is what we get paid to do. It is at the top of my agenda as soon as the record is closed. It is a little hard for me to predict how long it takes for technical types to finish technical work. But I think we are optimistic that certainly this will be resolved this year and certainly, you know, I think I am a little more driven toward the fall. And it is never as fast as the applicants want it, but I think the issues are probably that complicated.

NEW TELEPHONE CHARGES

Ms. ROYBAL-ALLARD. The Washington Post reported on March 29th that some of the nation's biggest long-distance telephone companies are beginning to charge customers $1.50 to have local and long-distance telephone service on the same bill.

In your opinion, should consumers be paying extra for this service? And is the FCC doing anything to ensure that consumers understand these charges and how to avoid them?

Chairman POWELL. We are examining that situation. I mean, one of the things that we think is an appropriate role of the FCC is as these industries reorient themselves and look for different business models, there is an enormous amount of customer confusion that results.

I often look through these complaints and evaluate where consumers' frustrations lie. And more often than not, surprisingly, it is not so much the amounts as it is the unending confusion about what this line item is or that line item is. You get this sense of

being nickled and dimed to death. It is not the five cents on the line, it is just where did that line come from and what on Earth is it?

Regrettably, there is a lot that we rest on the phone bills: the schools and library program is billed on the phone bills, universal service. There are a lot of lines. And that is before you even add the state lines.

So the Commission has regularly undertaken a number of proceedings that are designed to try to provide greater consumer clarity as to about what these charges are.

We have a number of initiatives, including one that I am considering initiating now that we will provide on our Web site of billing examples and more clearly explained explanations of these items, and to give consumers an ability to shop those differences.

Consider, for example, those fees are for driving people off that bill, which is what they are designed to do, for fairly economically sound reasons, but not every carrier is doing it.

You potentially could choose if that was important to you to go to another carrier, and I think consumers need to understand that.

Part of what we wrestle with as carriers is making sure they do not represent fees as mandated from the government when they are imposed at their discretion so that consumers know whether that is a charge that they can make a competitive choice over.

I think we are looking into that specific situation a little bit, but most of what they are doing is outside of our—you know, I sound like a broken record—but outside of our direct reach. We do not regulate long distance rates. They are deregulated. And certainly practices like that one. But what we do is respond by trying to provide a vehicle that provides better customer understanding or encourage the carriers or to the extent that we have legal authority, require the carriers to provide clear disclosure and clear explanations to consumers so they can make responsible choices.

A lot of what carriers are trying to do, just to give you some sense of it, relates to the fact that billing is a huge component of the costs of a phone service. And as the market becomes more competitive, a carrier like AT&T does not like that its billing relationship with you is on the bill of a local provider who is now its competitor.

If you get your bill from Verizon and it says Verizon all over it and your long distance charges are hidden in there, AT&T does not like that it does not have a relationship with you and is trying to get you disconnected from Verizon.

The other thing that is happening is people are really trying to push people toward electronic payment and billing systems so that it will lower the costs of billing and I would hope accrue to the benefit of consumers in the form of lower rates. But that is yet to be seen.

Ms. ROYBAL-ALLARD. I think what angered so many consumers was the fact that they were not even notified that they were going to add this charge.

Chairman POWELL. Yes. And we are very critical about that. I mean, I think at a minimum, even when a carrier is within its rights, it really has, you know, a moral imperative as well as an economic one to make sure that consumers are fully aware of what

those options are so that things are not slipped by them in the middle of the night.

Most of us do not read our bill with the level of scrutiny that you are going to pick up a $1.50 charge. You might not pick it up for a year. And I think we have made our views known to them about that practice.

MINORITY OWNERSHIP

Ms. ROYBAL-ALLARD. A recent report by the National Telecommunications and Information Administration of the Department of Commerce indicated that minorities own 3.8 percent of the nation's commercial broadcast stations at a time when minorities represent about 29 percent of the U.S. population.

Most minority owners who are primarily single station operators complain about their difficulty in competing against better financed, non-minority group station owners and say that the problem has been exacerbated by the Telecommunications Act of 1996. How carefully is FCC monitoring the Act and its impact on minority owners?

Chairman POWELL. Well, I think we were very aware of that continuing and persistent deficiency in the allocation of the ownership of these things.

I do think it is fair to say that the statute, particularly in the area of radio, dramatically liberalized the prohibitions on ownership levels that at a minimum, what that had the effect of is, really raising the costs of the station business.

The prices have been driven very high. They are very valuable properties, and it increasingly becomes very, very difficult to run a commercial station in an economically viable way because you are dependent on advertising revenue that others are competing with you for.

The other thing we are starting to see is that actually the explosion of so many new ways of communicating is further dividing the national advertising pie. It is sort of an odd detriment of diversity, which is, for example, the rise of, you know, there used to be three networks. There are nine if you count the Spanish networks. Now what it means is all of them are competing in the national advertising market, and you are getting further splintering of available advertising dollars. And when it pinches, it pinches really hard at the smaller independent stations who are competing against those kinds of forces.

One of the things that I have been a big proponent of and indeed helped encourage the development of a legislative proposal which I think was introduced last year briefly in the Senate and I hope would be introduced again by Senator McCain, is a proposal to provide some tax incentives for large commercial ownership interests to sell stations to smaller, more entrepreneurial people and be able to realize some short-term tax benefits as a consequence of that.

This is the reformation of a policy that the country pursued several years ago which admittedly was controversial, but I actually think is the one thing that we have ever seen that actually had an effect. We actually saw increases in minority and female ownership as a consequence. Because it was kind of win-win. If you are a big

commercial broadcaster, you might sell to a smaller interest in order to get the benefits.

Now the problem with that is, it was wrought with a lot of problems. There were shams. There were misuses of the program. These are things that I think a very significant group of people have tried to fix in the current proposal. I am supporter of it, but I think that the Congress and the government can look for ways to incent behavior that they socially want to advance, just like they do in other aspects of the Tax Code.

What we are finding with the minority and female problem is it is really an issue of capital access. It is an enormous amount of money to access. And, you know, since the Commission does not really provide funding for operations, we do not—I think sadly, we do not control the most key piece of how to make them more viable. But I think if we look for ways to incent that behavior, we may be able to make some improvement in those numbers.

MARKET ENTRY BARRIERS

Ms. ROYBAL-ALLARD. And my final question has to do with a policy forum that the FCC conducted on market entry barriers that were faced by small business minority and women-owned businesses in the communications industry last December.

And they analyzed a series of market-entry barriers. And there were two findings. One was that minority applications for debt financing were less likely to be approved, and that minorities paid higher interest rates on loans than did other owners.

The second finding was that market consolidation permitted by the relaxation of FCC's ownership rules has created nearly—and this is a quote—"nearly unsurmountable obstacles to those seeking to enter or survive as a small player in the broadcast industry".

What can be done to address these historical financial or financing problems?

Chairman POWELL. Well, at the risk of being redundant, part of it is the answer I gave before, which is the tax certificate policy and other kinds of policies like that designed to improve that situation.

In 1996 the Congress also established something called the Telecommunication Development Fund, which it seeded with a relatively modest amount of money, I think 25—was it thousand or million?

I would have to get the number for it to be precise. But it was seed capital, the interest of which could be used for investment in the kinds of initiatives you are describing. The cold reality is it is severely undercapitalized to make a serious impact.

I mean, certainly if the Congress chose, it could consider capitalizing that at a more serious level. It could consider things like whether some element of auction proceeds could be directed into the Fund for investment.

None of these things are anything I have sufficient authority to do independently. We have been creative about ideas. But, you know, they represent judgments of where the Congress wishes to distribute the funds, and that is above my pay grade.

So I think that those are some opportunities. And I think that the Commission's studies basically highlight the problem. And for

those parts of the community that are able to assist, it helps get those balls rolling.

For example, the commercial broadcasters responded in some ways to those studies and created an investment fund designed specifically to invest in minority interests in a commercial way.

There have been some criticisms of lending practices, some complain that they are not sufficiently liberal in their disbursement of investment funds. But, you know, that is something that is going on out there, and if there are unfair trade practices I suspect that that is something that the Federal Trade Commission can evaluate as well.

Ms. ROYBAL-ALLARD. Thank you.

Chairman POWELL. You are welcome.

Mr. LATHAM [presiding]. The Chairman has stepped out for a moment, so he informed me to just go ahead and proceed.

BROADBAND IN RURAL AREAS

Welcome, Mr. Chairman. I just have one question I guess and would like your input. As you know, the House Energy and Commerce Committee has passed H.R. 1542, the Tauzin-Dingell bill. And it will be coming to the Floor, I assume, shortly.

Being a representative from a rural area which I think advocates for the bill think that it will be of assistance in rural America, I would say that there is a lot of debate on that. In my region, many of the companies who are pushing the bill have really sold their assets off in rural America. So I am not sure about the effect. There are some other folks who are in opposition to the bill who have invested substantial sums in the region.

I guess first of all, I would ask you what concerns you have or what are the biggest impediments to developing broadband Internet service in rural America? And have you taken a position on the legislation? And have your economists analyzed the full impact of the legislation on smaller competitors?

In the State of Iowa I think we have more phone companies in Iowa than we have in the whole rest of the country together.

Chairman POWELL. You do.

Mr. LATHAM. We have a hundred and I think fifty-four, or maybe it has probably changed since the last number I have heard, but independent phone companies in Iowa impact on those companies and the long-distance carriers.

I guess in general, do you believe the Tauzin-Dingell bill is consistent with the goals of the original Telecommunications Act of 1996?

Chairman POWELL. Well, we as a policy do not take positions on specific legislation, though we do provide technical assistance when requested.

We have not evaluated the impact to the degree that you suggested. I do not even know that we would be capable. But just to answer your question, I do not think we have.

One thing I will say about the way to think about the legislation is it represents different visions of the future. One I suspect is probably the vision of the proponents of the legislation that the future is data, and the future is broadband, and that those services

are going to be provided to consumers by technology differentiated offerings.

So if you are a consumer, you will look out in the world and you will have one broadband option that comes from the public switch telephone network system, twisted copper wire, DSL services. You will look to the right, and there will be your cable service provider, and they will provide using coaxial cable and IP protocols, a cable-based option. There are at least two that are already in a mass market stage.

We also think there will be a wireless option for a lot of Americans, as well as a fourth, satellite option. The real benefits of competition and choice will be realized by consumers by these different technological offerings. It may be possible as a consequence that within any one of those stovepipes—the phone option or the cable option—that those markets are fairly concentrated, even perhaps at monopoly or oligopoly levels, but that you believe that the harm will not be significant to consumers because the choices to them will be those three or four as competitors to each other as opposed to competitors within a grouping.

Another view of the world is that, no, that it is very, very important to have small entrepreneurial entrants that come in within a stovepipe and compete against either the incumbent or the large carrier. That is true in cable or telephone. I mean, the open access debate in cable is essentially that same debate. Do you need intractable competitors?

Certainly they provide a competitive spur. Certainly they can be the source of innovation, too. But it is a very heavy regulatory regime. That is, it takes an enormous amount of our effort and energy in the regulation of the interconnection relationships between, say, a small DSL provider and the incumbent, and it is fraught with lots of challenges.

The 1996 Act in its original form was less focused on this kind of broadband data future to the degree that the current legislation flirts with. So, you have to evaluate those two different versions of the universe and how you resolve that probably has to do with how you come out on the legislation.

I also think that the overlay to all of it is a timing component—and do you believe that world is here? Or do you believe that world is inevitable? Do you believe that world is not inevitable? For example, you can certainly say that cable and phone companies are providing two important broadband offerings on a mass market basis, continuing to grow. Certainly you can see the buddings of wireless. You can see the buddings of satellite. What level of comfort does one have that those two are enough or that a third is inevitable or that a fourth is likely to raise your comfort level? And is that where you think you are sufficiently in 2001?

I think reasonable people can think so, and reasonable people can think not.

But I really think that is what is at stake in that question. It is very difficult to predict. I will be candid. There is not a company out there that does not know the political value of saying that their view of the world is better for rural America. It is very difficult to sort through that stuff. Because certainly when you are talking

about phone infrastructure, the teledensity issues and the rural nature of the market are significant costs of deployment.

On the other hand, for example, if you buy this future, it will be a much less significant component of wireless service. And it will be an almost trivial consideration to satellite service. From 28,000 feet at the Clark Belt, your district looks no different really than Manhattan does to the satellite. So that ruralness is not a critical component of its deployment.

So, you know, I often sort of listen with awe at the degree to which everybody promises to serve rural America, and the consequence of their vision on the world.

But I do think that we underestimate the 1,300 to 1,400 rural phone companies and providers that are out there. I think we sell them short sometimes their ability to provide services. I think many of them are doing outstanding things, and we should pay a lot of attention to those small guys, as much as we do to the Bell's vision or the cable company's vision of rural America, because the companies that are at the core of serving that are the ones that, you are right, proliferate all over your state. And I think that is what our focus on the rural high cost fund and other things should be to help make sure that since they have always been serving their rural communities, they continue to be a viable part of that.

Mr. LATHAM. Well, we have, in addition to the commercial providers, we have several municipal companies who are involved in Iowa now with even wireless communities right now with municipal basis. It is going to be a debate that is going to have long-term consequences obviously, and it is one that—it is very hard to cut through all the clutter, obviously.

And just what is your interpretation of the intent of the 1996 Act as to whether or not digital communication is the same or is different than voice communication?

Chairman POWELL. I think that the 1996 Act is somewhat agnostic on that question. It talks about telecommunications, and the definition of which easily includes digital transmission as it does analog. It is important to recognize a good part of the phone system right now certainly uses digital communications. Sprint or AT&T when hauling voice traffic is unquestionably using digital communications over fiber optic cable. Even incumbent telephone companies today have some component usually of any phone call that includes digitalization.

So it is hard sometimes to treat this as a very binary thing. There is analog and there is digital, and somehow one is always the old thing and the other thing is always the new thing, and it is not usually quite that simple because networks usually are a hybrid of those things, depending on the efficiency.

The last mile is usually more clearly differentiated. Your and my house have twisted copper wire, and it is analog. There is no reason it has to be that way. We actually hope one day that it is not.

But I am not so sure I am of the view that the 1996 Act went into much detail or thought on the bifurcation of those kinds of services, with one exception, which is I think the 1996 Act recognized this category of people called information service providers which basically were the Internet people—ISPs. And while they use digital, I do not think that the statute focused on them because it

was digital but because it was the Internet and there was a desire to not have them get caught up in the regulatory constraints of the phone model.

I know I said nothing. [Laughter.]

But, you know, I do not think there is much to say there about the difference.

Mr. LATHAM. Okay. Well, I appreciate your candor. Thank you, Mr. Chairman.

Mr. WOLF [presiding]. Should we strike the comment that you said nothing, or should we just leave it? [Laughter.]

No. I will admit to my spin.

Mr. WOLF. Mr. Cramer?

ULTRAWIDE BAND TECHNOLOGY

Mr. CRAMER. Thank you, and welcome to the Committee. I want to add my welcome as well. Speaking of clutter and new things, I want to give you the chance to talk about uwb, ultrawide band technology. You have been considering the regulation of uwb for some time now, almost three years. And I would like to know when you expect to proceed with your rulemaking so that this new technology can be deployed. Because it can save lives and it can offer benefits to consumers.

Chairman POWELL. The Commission itself is extremely excited about ultrawide band. It may be one of the most phenomenal innovations in spectrum ever. I know the individual credited with its invention, Larry Fullerton, I think is a resident of your state, if I am not mistaken.

Mr. CRAMER. Yes. My district.

Chairman POWELL. It is an extraordinary possibility. I think the Commission is very excited about trying to pursue things that are able to use spectrum efficiently and share with others so we do not have the continuing problem of scarcity because we just do not have enough spectrum for all uses. When we start to have creative uses that can use spectrum already occupied, we are excited about that.

This issue is another example of technical difficulties.It is bringing the engineering talent to bear to evaluate the technical interference questions which we have an obligation to do.

There is a proceeding underway on ultrawide band. It is fairly far along. We have recently received about four technical studies that the engineers are currently going through. We have other studies that are coming from the government in the summer that will have to be a component of our evaluation.

One of the challenges here is that the potential spectrum that the service wants to operate in is spectrum that is used for defense and public safety purposes, and those communities understandably I suppose, are very, very concerned about being absolutely sure of no interference because these are things like the GPS system satellite. The air traffic control system uses spectrum that this transmitter will intentionally radiate into.

So the government side of the spectrum users are really concerned about interference. I think we can work that through. But we are waiting a little bit for the government to complete its evaluations, because we have an obligation to coordinate with federal

users. And when we really get the rest of that data from the Commerce Department, NTIA, then we will be able to quickly proceed. I think that is the fall part of the year.

Mr. CRAMER. Can I add to what I think you are referring to? I am confused because on May the 2nd in Global Positioning and Navigation News, you have got a GPR firm, Geophysical Survey Systems, Inc., that admitted it has sold uwb devices for decades, and there were no waivers there. How do you square that or can you square that yet with the process you are going through and the concerns that you are raising?

Chairman POWELL. I would have to plead some ignorance on the subject of the specifics of what is the company and the service you have mentioned, but it is important to recognize that ultrawide band proposes to operate principally in a band that is unlicensed. And so you do not have to get a waiver and/or approval to operate there.

It is the same spectrum that your clock radio would emanate in, your microwave oven sends out radiation in that band. You do not have to get a license to use it. And I think we have permitted certain uses that stay foursquare within the Part 15 rules of unlicensed spectrum.

The challenge is what does ultrawide band really want to do to realize its full potential—if there are bands that are restricted for the reasons I described, like GPS and public safety. And this technology intends to purposely radiate in them. It intends to operate in spectrum that has legally been restricted from that before.

Mr. CRAMER. By the use that we have seen of it already, there is indication that there are no interference problems. There can be no interference problems.

Chairman POWELL. No. And I do not mean to suggest that the Commission has reached its decision that there is or there is not. I mean, I do indeed think that we are probably a little more inclined toward the positive side of this.

But we—it does not excuse us from the obligation for those government users who are license-holders who have articulated their concerns for whatever reason and are going to accumulate them and submit them in the proceeding. We will have a duty to go through them and guarantee that—not guarantee, but be reasonably satisfied that they have not presented anything that concerns us.

We already have hinted positively at our own initial judgments, but we still have communities that we cannot ignore that claim that their technical studies show problems.

I also think that you have to think about it on a mass market scale as opposed to kind of the limited uses we have probably seen to date. But I personally am optimistic about it and think that it will happen.

Mr. CRAMER. I want to bring you back to some speculation about timeframes. Another year, several years or?

Chairman POWELL. No. I personally think that, at least it is our goal that we—I think we would be finished this year. But we are in many ways dependent upon the government's completion and filing on the record of the stuff we will need to do that, and then

whatever time it takes for us to resolve any technical questions raised by those studies.

That is why I am a little hesitant to say for sure the time, because there is a shoe yet to drop, which is full presentation of the government's position. And if it raises issues we had not foreseen or there are technical questions we did not understand, you know, that might take longer. If there are not, I think it will take much less.

Mr. CRAMER. All right. And I do appreciate your attitude about it, because I do think it is incredibly exciting and almost overwhelming the potential that that has.

EXCELLENCE IN ENGINEERING

Could I switch now to your Excellence in Engineering Program and give you the opportunity to comment about that? Especially I am interested in what kind of strategic partnerships you are forming with universities to develop a trained pool of personnel applicants, and especially HBCUs.

Chairman POWELL. You will excuse my—HPCUs are?

Mr. CRAMER. HBCUs. Historically Black——

Chairman POWELL. Oh, Historically Black Colleges and Universities. Well, the program is in its infancy, but by way of setup, let me say this. I agree completely with the Chairman's point that public service is about more than salary. And the part that we think is actually the killer ap in the engineering equation is the idea that it is an exciting environment in which to do interesting work and maintain your currency in the Engineering Guild. And so our training and development programs I personally think are the feature much more than the personnel salary stuff, although that is important.

We have begun to explore quite aggressively partnerships and relationships with private institutions, private labs and universities. I do not have a specific list in front of me of whom we have approached about that. But we unquestionably have seen that as a rich opportunity—to share resources or allow our engineers to potentially participate in laboratories that are in other locations, have university students be able to be a part of our policymaking process within the limits of that.

I do not know for sure whether there is a specific HBCU that we have addressed in that regard, but I do not think that we have any aversion to doing so, depending on location and whether the interests are sufficiently synchronous. Indeed, I think that would be a good thing to do if it is available.

One of the things we are looking at too, which I know is an interest to the Chairman as well, is a lot of what we hear when we do our surveys with engineers, what would you need. A lot of them say, you know, there are a lot of people who would work for you on a part-time/full-time basis, but they do not want to move to Washington. They are in Silicon Valley. So the component of telecommuting or the ability to be an active worker with the Commission's business from a different location presents real opportunities for the engineering effort as well.

A lot of Silicon Valley engineers, for example, who do not want to leave that part of the country—it is a vibrant environment—

nonetheless would be willing to consider work with us if they could access it.

I think colleges and universities that are not located here may present similar opportunities if we can figure out meaningful ways to do that.

Mr. CRAMER. Thank you. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Vitter?

TESTING OF LAND-BASED TECHNOLOGY

Mr. VITTER. Thank you, Mr. Chairman. Mr. Chairman, thank you very much for being here. I am sorry I could not be here earlier.

I know Ms. Roybal-Allard brought up an issue already about the need for the FCC to act on applications for earth-based technology to serve unserved and underserved local television markets. And I know you had a discussion about that.

I do not want to repeat all of that, but I did want to follow up and reiterate my concern and my real hope that the FCC acts on this as quickly as possible.

I believe one of your responses was that you are waiting for the conclusion of an independent test that is going on. I wanted to make a couple of points. First of all, as I understand it, we mandated that that test actually be concluded by last February 19th, and it was not even begun by that date. So I am concerned about the timetable of that test. Do you have a firm expectation of when that independent test will be concluded?

Chairman POWELL. Well, the test is concluded. We have the test in our possession. What we have as a matter of mandatory process is the test was put out for public comment. We received public comment. We have a period in which we are required to allow reply comment, the date of which closes I believe if I am not mistaken tomorrow.

And with all candor, the original date was a problem because it was established long before the legislation actually passed. And so in many ways when the budget proposal passed, the test due date was a matter of weeks away from the initiating authority. So we regrettably were not able to do a complex test that quickly.

But we take seriously that Congress wants this wrapped up. I do not think that that is an issue to us. I think that we have a technical threshold set of issues that Congress recognized by mandating the study.

We are in that process. We are near the end of at least the closing of the technical record on that process. And so I think we will move expeditiously through the technical questions.

Secondly, I think we will have this set of legal questions, which I do not think are trivial, to work out as well. So there are these two components.

I can assure you and pledge to you that this is on as expeditious a track as the Commission can have it on, at the same time being faithful to its obligations to ensure that (a) it complies with the law, and (b) that we are not inadvertently permitting an impermissible technical situation.

So it is top drawer.

Mr. VITTER. Given the timetable you laid out in terms of the closing of the comment period—I apologize. I thought the testing was still going on, but that is completed. Now we have the comment period. Given the clear timetable about when that will close, when would you expect action?

Chairman POWELL. Well, as I said earlier, I certainly am hopeful that there will be action at the worst case this year. I think more optimistically it will take at least several months to work through the technical questions and the legal questions.

It is important to recognize concerning the process that it is not a simple matter of, okay, we are done, here is your license. The applicants have applied but their applications have not yet been accepted for licensing. There are a number of rules that have to go on in developing the—once we, even if we were to conclude that there is not a technical problem, we then will have to write the rules for operation of the service. We will have to write the technical parameters, what the conditions of the licenses are. We will have to make a determination on how they are allocated, and whether there is any mutual exclusivity so that you can get a license without auction.

If we conclude that an auction is required, that is a whole other process that we will be required to complete. We will have to establish an auction date. We will have to run an auction. And once we have the completion of that auction, we will have to allocate the licenses as a result.

I understand that Northpoint and others have a scenario in which I understand and they may be entitled to, which is: only we are getting the license, and we are not going to have to pay for it at auction. It is only a technical question. But that is still yet to be finally concluded.

And so, there are so many variables at each of the stages of judgments, that it could be relatively short, if there are really clearly no technical problems and we conclude that they are the sole viable applicant. But if we conclude otherwise, which is possible, the process starts becoming substantially longer because of the auction process and the rules that are required.

So, to be honest, I am not able to give that firm a date for all of those reasons. But I think that we think it is possible that we will make significant progress if not completion in the context of the current year. And I know that that is not completely satisfying to them. But I think it is a fair assessment given the magnitude of what has to be determined.

Mr. VITTER. At the beginning of your response I thought you were describing year end as worst case. But then from what you just said, there could be a worse case than that. Am I?

Chairman POWELL. The part that I would have to consult with people about is if we were going to do an auction, how long would that take. The other thing about auctions is, we generally run them to exhaustion. So, you know, sometimes auctions close very quickly because nobody is bidding anymore. Sometimes they go on for months and months. So that is a variable completely in the context of bringing the auction to its completion. And if you cut that part off, if an auction is not required, then the applicants can be award-

ed licenses without that process. That is a lot of months that are quickly shaved off what might be required.

Mr. VITTER. Is the auction issue, whether or not an auction is mandated, the biggest legal issue on the legal side that you are discussing?

Chairman POWELL. Yes. Let me think of a way to—in a nutshell, there are three kinds of issues: Purely technical, factual—the interference question. Secondly, a question of law, whether under the statute that mandates auctioning for terrestrially-delivered service, could these services nonetheless obtain their licenses without auction?

That has to do with whether they are mutually exclusive. Are there other people who want to do the same thing and are capable of doing the same thing? If the answer to that is yes, usually an auction is compelled by law.

So the third question is kind of an application of the law to the facts, meaning if we think it is possible to award one without an auction, then we have to evaluate the applicants to see if they are proposing what the law requires, and whether they are qualified applicants or not.

Mr. VITTER. Okay. Well, obviously, you need to and you should follow the mandates of the law. I will express this concern with the auction process. That if the process is strung out so long that it actually gives other companies the time to develop technologies that they were not developing within any reasonable timeframe, and at the end of the day—and we get into an auction situation—and at the end of the day, through this long process we have created an enormous disincentive to innovation because if through the bureaucratic process extended the period so long that the people who came up with the technology have had to sort of sit around and wait and watch other folks catch up with them or copy it, and then they are basically penalized for having led the charge and innovated to begin with.

Chairman POWELL. I think that is a genuine set of concerns. At one point government policy used to ascribe a preference to pioneers who achieved first-to-market innovations like that and the government was able to license in limited ways without the additional step. That process has been repealed. We do not have that as an option.

In many ways, Northpoint's most compelling argument is that they are an innovator and a pioneer. It is just that there is not really, under the way the statute is crafted, a credit for that purpose in and of itself, even though I personally share your view that we want to make sure that the incentives for being the innovator are retained.

Mr. VITTER. And I am not suggesting that we establish some credit that is not there in the law. But I do not want to do the opposite, which is through an unnecessary long process and delay, we do the opposite and establish a penalty.

Chairman POWELL. No. And I understand that. So we are cognizant of all those factors as we try to figure out the most efficient way to wrap up the proceeding.

Mr. VITTER. Okay. Thank you, Mr. Chairman.

EXCELLENCE IN ENGINEERING

Mr. WOLF. I wrote down a couple of questions as I was listening to some other questions that we will try to get back to. But let me cover this Excellence in Engineering.

I understand that you recently sent Senator Burns a proposal for a program called Excellence in Engineering. Would you want to explain a little bit more? And it is not in your budget submission, and I guess a question would be, is this in lieu of something or is this a reprogramming? Are we missing something, or can you tell us a little bit?

Chairman POWELL. Sure. Let me give the complete background. When I took over at the Commission in essence the FY 2002 budget was done. It was developed and prepared and the budget numbers that we request today are the numbers that have been developed on that process.

In my leadership at the Commission, I recognized this issue about engineering and began developing a program that we thought would help satisfy those needs. That program was not intended to be a budget proposal of any particular type, more a managerial program. It will be a budget proposal over time as we identify cost and needs that we will need to seek appropriations for, but that was not its original genesis.

We had testified about the issue of engineering. We had made known our concerns about the importance of the Commission improving this. Apparently it caught the attention of different legislators. We were then approached by Senator Burns and others about it, asking to tell them more about the program.

We shared with them the text of the program. They then asked specifically what kind of numbers would be associated with different parts of this component and we were asked specifically what components would be above and beyond what you think you already are seeking in terms of the FY 2002 budget?

We merely provided those numbers. We did not intend for it to be seen as an earmarked appropriation or anything else, other than a response to, an honest response to what we thought would be the additional costs.

Our view is that it is an important program, one that we are going to pursue over a number of years. It undoubtedly will be a component of future budget submissions as well.

I also think there would just be two points to be clear about. The $248.5 million request is our request, and it is the critical part of what I need, and a substantial part of the increases are for IT programs that are as much about the importance of engineering as the stuff included in the proposal that was in the letter. So to our mind, those services are not in lieu of or a substitute to our submission.

If the Congress in its own judgment believes that the additional needs that we have identified in the context of our program are merited, we certainly would be more than happy to absorb that in fee increases as opposed to appropriations. But we tried to be careful not to get twisted up in the appearance of seeking an additional appropriation.

What is critical to us is the number that we have requested in the Fiscal Year 2002 budget. That is the most important part. I will stand by the engineering program and the need for those funds, but I think in our minds that is something we could begin to use now, but we also intended to be part of a long-range, long-term program.

Mr. WOLF. When I was chairman of the Transportation Appropriations Subcommittee, we set a relationship up with some area universities for the FAA to do basically the same thing. I think you have got to be careful, though, that this does not become a pork project. I think there probably ought to be a peer review board to establish a new program to make sure that it is legitimate.

I think it is very important. I think continual training is absolutely necessary. I do not even think it should be an option. And with the opportunities now for teleconferencing, you do not have to pack up and go to the university.

As we move ahead, we must make sure that it is not just someone saying: "Here is a great opportunity, maybe I can get the university to create a new program. Nobody at the university knows anything about it, but maybe I can hire somebody. . ." and all of a sudden, you have a new program.

And so I think in the process of doing this there ought to be some peer review to make sure it is truly in the best interests of the FCC and lastly, truly in the best interests of the American people.

Chairman POWELL. I would agree. And if you will see our rhetoric when we lay this out in writing, I always heavily emphasize the word "independent". The genesis of this proposal and our recognition for the need for it was one that recognized that we had to be able to do indigenously the kind of work that allowed us to maintain our integrity and be an honest broker and a government decisionmaker.

Mr. WOLF. Exactly.

Chairman POWELL. And not be a lackey of any particular interest.

Mr. WOLF. Believe me, I think that is very, very important. And I think that is part of the problem in this complex society, that many of the agencies are going to have more and more people you are regulating that have greater skill and talent than you do. And so I think this is important.

I do notice from looking at this chart, 83 percent of your people are here in the Washington, D.C. area. So, again, I am not looking to say bring something to my area, but I think as you look at that you have got to look at your locations. Obviously you had teleconferencing, so everyone does not have to be where everybody else is.

But it is important. And maybe on a bid or a peer review process will ensure that it is being done in a way that meets the needs of the FCC.

And I know you share this view with me. I just wrote down that it is important always to be looking after the interests of the American people, and not after the special interests. And you have a very important job. And I think to be an advocate, if you will, and I am conservative Republican, probably more conservative than you are. And I believe in the marketplace. But I also believe in the best

interests of the American people. And I think you have a sacred trust. And the word "public servant" is a good word, and you are in a particularly important position whereby special interests who have firms in downtown can have access to you easier than somebody in Mr. Latham's district in a rural area or somebody out in Page County or Luray in my Congressional District.

And so some jobs are more significant insofar as that as others. There are very few people in the telecommunications business that do not have a law firm here in town, whereas the people that I know and you know very well, whether they be in the inner city or in the rural areas, do not have that.

I think Mr. Taylor's comments with regard to the pay telephone is very, very important. There are communities where people cannot afford a cellular phone. They cannot afford the service. In my old neighborhood there were a lot of people that did not have a telephone, and the corner store would send somebody to run down and get you on the phone for a call.

Now we have moved ahead, obviously. But there are a lot of people who, for whatever reasons, are not going to have cell phones. And there are people that are driving along the highways that will not have cell phones. And I think if we move to the point whereby there are no pay phones on the corner, in the neighborhood or in the rural areas, we will have a real problem.

So, you know, to whom much is given, much is expected. And as opportunities are given to companies, I think there is a certain responsibility. In a rural area or in an inner city area, no telephone, no 411, no 911. So I think there is a certain responsibility there.

MANAGING THE SPECTRUM

When you move toward the innovative technologies with regard to the better management of the spectrum, I saw an article about the competition for spectrum ranging from the telephone industry to the Department of Defense and the Catholic Church. Right now we have a bifurcated process for managing the spectrum, both the FCC and the NTIA at Commerce. Should the current process be changed? Should it be centralized? Does it make sense? Or should there just be one?

Chairman POWELL. Throughout the history of spectrum, there has always been a division between the independent agency that regulates commercial spectrum and the Federal Government users of spectrum within the Administration.

I think that it is difficult, particularly when you consider that, for example, the Department of Defense is a huge consumer of spectrum. Who should make judgments about its use of that spectrum in warfighting scenarios? It should really be the Commander-in-Chief, and I think it properly belongs under the umbrella of the Presidency and the Executive Branch.

So there are real issues about whether anyone would think it appropriate if somehow that spectrum was moved under the umbrella of an independent regulatory authority. And similarly, I think that there are real concerns about if all the commercial spectrum were suddenly moved under the Administration, due to the technical demands and what people view to be a premium of independence from those judgments.

That said, there is no question that the country has got a problem, which is that it does not have as much cohesion in national spectrum policy as it might because of those different authorities. I think that one of the things that is being pursued increasingly and very aggressively is better coordination mechanisms that are forward-looking as opposed to reactive between the two institutions. There has been the regular discussion and evaluation of spectrum needs and the developments that are coming down the pike so that the government as a whole can begin to anticipate spectrum demands and do a better job of coordinating them.

My own opinion is that the best fulcrum for that right now in the current structure is in the Commerce Department, with the personal involvement of the Secretary, who has the ability to talk as equals with the Secretary of Defense, with the public safety authorities, that can get the ear of the President in making difficult judgments between whether the higher and best use of this is in the national security establishment or in the commercial sector, and that can be a key place for coordination of that effort.

This has become even more complicated because it has a very big international dimension. Spectrum coordination is not a national activity now. It is an international activity. Certainly it is with satellites that cross multiple jurisdictions. And increasingly because of mobility, it is with wireless phones, too. So it also means that someone needs to sit with an effective decisional voice at international forums. The Commission is not permitted in its role to be the representative of the United States. The Presidency has to be such a representative.

So we have officials at the Department of State and Commerce. I do not know that what is needed is more than a real cohesive examination of the way we do it and looking at ways to improve the coordination and make clear who has what roles and in what context and what are the legitimate areas of support and cooperation. I personally have had a number of meetings with Secretary Evans on just this subject. He seems to be personally committed to just that. And I have personally been—it has been warming to see that at that senior level there is some attention being focused on this.

I think that it has another dimension, which is intra. I mean, we are working on this as part of our organization and restructuring, too, because we have the same problem even within my own building. I mean, the Mass Media Bureau takes care of spectrum dealing with television, and I have got a Wireless Bureau that does spectrum for telephone systems and other systems, and Direct Broadcast Satellite and Satellite are in a whole other bureau, and I have the same coordination challenges, which is part of the way we are looking at the reform operation to fix that as well.

So, yes. In sum, the government could do a lot better at this. I do not know that I know a magic structural bullet if you are not willing to move them all under the same umbrella. But I do think there is so much room for improvement on the coordination front that we can probably substantially improve the situation.

Mr. WOLF. Are there regular meetings, structural meetings, every so many months or every so many weeks?

Chairman POWELL. There are some regulatory meetings with a group called the IRAC, which is sort of an interagency coordination process of spectrum.

Mr. WOLF. Who is the chairman of that, the Secretary of Commerce?

Chairman POWELL. I think it is done under the umbrella of the Secretary for federal usage. But really what has been missing is not that working level of the technical inclination. It is the high level involvement of serious policymakers, decisionmakers to be honest, it is up from that. It is the Secretary himself or herself. It is the Secretary of Defense or one in that top ownership group being involved I think in those decisions that is important.

I mean, I assure you, you go down into the military departments or the mid-levels of the Defense Department, the answer will generally always be the same. We are not interested in giving back spectrum. I mean, it is the same thing with commercial entities. We have the same thing. There is no broadcaster in America interested in giving back spectrum.

So what you really need is people who have that kind of decisional and scrutinizing authority to say, well, we are going to take a careful look at what you are saying you can or you cannot do without, and we are going to make some decisional judgments about the merits of that. And I think that requires very senior members of the government and not just—which have done good work—but not just the working level of coordination, which I think works fairly well.

OBSCENITY AND PORNOGRAPHY

Mr. WOLF. A couple of other issues, then I will recognize Mr. Serrano. The issue of obscenity and pornography. When you came by my office, I raised it. It was Sunday, April 15th.

And it is about the media and violence and sex. At the end it says, "But in the long run, it is we parents who can and will make the difference. First we will have to play catch-up and do it quickly. According to Parents' Television Council, a nonpartisan group that advocates responsible programming, the number of sexual references on television alone more than tripled between 1988 and 1999, and the pace continues to mount. That means that middle school children today are growing up in a culture that is different not just from mine but even from their older siblings.

"Children and adolescents are still looking to us, the adults in their lives, for guidance, limits and values. And believe me, I know these truths directly from the thousands of young people I have listened to in one-on-one classroom discussions. It is up to us to close the gap between what we want them to think about sex and what those who are after their attention and their dollars want them to think. Let's hope it will not take too many more teenage sexual scandals or tragedies before we do."

I remember the debate on the V-chip. I voted for the V-chip. There was someone who went down on the floor and said the answer is just moms and dads. But you know, that is very difficult. There is almost nothing that can be watched after eight o'clock at night on most evenings.

And I know the Commission does not monitor broadcasts for indecent materials. They have to receive complaints from the public. As I looked at the regulations, this is very complex. I mean, moms and dads just do not generally sit there with a VCR to record or with a tape recorder to collect the information needed for a complaint.

You propose a proactive policy to encourage innovation of competition. Kids use all kinds of communications and technology. They are exposed every day to pornography. The recent statement that you made almost indicates that you just were going to almost take a hands-off approach. And I do not think that is the best policy. I do not know exactly what the law or what your burden is, what your obligations and requirement are, but you are the communications leader in the nation.

You are—if somebody stopped me at Tyson's Corner and said who do you think is the most knowledgeable person with regard to telecommunications and who can I call—I would say Chairman Powell. He lives in Virginia and he came before my Committee. He is the guy you ought to talk to.

So I think this is a burden that you have. Maybe it is not a legal requirement. Maybe it should be legal and maybe the Congress ought to do a better job. But there is a burden. And I would hope that you take that responsibility seriously—I have a lot of tough questions once we are gone to submit to the record.

I do not plan on grilling you here. And I am not trying to put you in a difficult spot.

But somebody came by the office the other day and he was a former fighter pilot and he said if that you are not taking flack, you are not over the target. And in some respects, if you are not taking the flack on this issue, you may not be over the target.

So, on behalf of the moms and dads and this one Member—I remember I broke with my party on this issue—I know there are a lot of problems. You get a single parent who has two jobs and he or she is not home all the time to watch TV, and everyone is not home at four o'clock to say what ought to be on or at eight o'clock to say what ought to be on. And so I know some in my party would disagree with me, but I think there is a certain burden and an obligation Garbage in, garbage out, on what is coming over the airwaves.

So do you have any comments? I am going to submit these for the record, but I am going to cover two other issues with regard to this. But do you have any thoughts or comments? I thought you said you did not want to be a national nanny. I am not looking for a national nanny. But I am looking for somebody who is willing to say this is a problem. We have got to deal with this. If you have the authority, move ahead and deal with it. But if you do not have the authority, come up to the Congress and to the Administration and say we do not have the authority and you should know that this is a problem and we need more authority.

Do you have any comments to make?

Chairman POWELL. Sure. I will just make a few general comments. First of all, no matter what comments you may have read or not, I am—I do not in any regulatory endeavor take the view

of laissez faire, which I think if anyone really knows what that means, that is the complete absence of rule of law at all.

That is not market economics. That is a theory. There is no country in the world that has ever followed it, and this country certainly is not one that does either, and it is not a part of my personal philosophy.

Moreover, at least with respect to some of what is on, it is not discretionary anyway. I have statutory duties and obligations to enforce a component of indecency regulation under Title 18 of the U.S. Code. And that is something we do as an enforcement matter currently and will continue to do.

I think that I cannot disagree with some of your characterizations about what is on broadcasting. I have two sons. I watch a lot of television. I listen to a lot of radio. And I know the range of things that are bombarding their lives, and I know the challenge of a parent is to protect the values I want to instill against what they are exposed to daily.

But in fairness, I think there are two ranges. My view is, in the time that I have raised my sons, we are in a period where I have seen the best of television and the worst of it. I think that in some ways what we have seen is the real amplification of the media culture; I think we see some of the finest things that have ever been created available to us. I also think we see some of the most toxic. And it is a real challenge and a great confusion for consumers to figure out how to navigate that which they choose to avoid and that which they do not.

I am a big believer that it is also difficult to arbitrate among different values of parents. But one of the most powerful things that I think the government does in a positive direction is what you said you supported. I think that looking for ways to empower parents and empower them in a way that they can make choices and then those choices can be adhered to while they are not around is valuable.

The V-chip certainly is one approach to that in the violence context. But I also think that the ratings system which the government strongly encouraged in which programs are rated and provide some warning and technologies that will read those ratings and block programs is becoming important things in the market.

You emphasize innovation. I have a dish. I have 400 channels. I can assure you I hardly ever know what is on all 400 of those channels. But I have learned that the new guide technologies offer a lot of power and possibilities for me to limit what we watch and we do not. For example, I have programmed using the guide the TV—a kid's guide. And when my kids change the channel, it will only go to the channels ascribed to their guide. It will not go—it is not a lockout or anything, it is just that the remote control will not go there. And I have learned to use that, and that works when I am home and when I am not home.

I think the government looking for ways to empower parents in that regard is a healthy direction. I think on the dark end where we find intolerable content that crosses the definitional lines that are prohibited, we will enforce them.

But I would be remiss if I did not, you know, pay some caution to the constraints that I have, which are less about authority and

more about ceiling, which is I do have to do it within the context of the First Amendment and First Amendment jurisprudence. The First Amendment is not an excuse in this regard, but only a challenge. And whatever judgments you make, you do have to navigate its restraints.

We are, rightly I think, sometimes cautious in the area only because of the Constitutional implications. We try to keep pace with what the courts determine are within our realm of actionable activity, and we try to navigate that. I will tell you, it is very, very difficult. These things are definitional issues.

It is very hard sometimes to sit down and spell out or write with some specificity what is prohibited and what is not. And so we have always had to be, and I think rightfully so, cautious. But I just want to assure you that I am not dismissive of those concerns and I am not motivated by them in my own personal life and in the way that I look at what our responsibilities are.

But I am equally committed to the sacred values of the Constitution and I am careful that I am not overly imposing my judgments in a way that the courts will find objectionable.

Mr. WOLF. Well, of course, I am too. I was a lawyer before I got elected here, and I think certainly am aware of community standards. I think you can make a certain justification for acting and in certain of these cases, the FCC did move.

You are the leader, though, with regard to communication policy. And I think the comment is that I think there are times that you have to be bold and help out. And I really worry sometimes that there may be a tendency of some who say, I do not want to go there because I know there is going to be a lot of flack and a lot of complaint, and I will be ridiculed.

We are not asking specific questions here. But I am going to watch this issue. I care deeply about it. I am not trying to impose my values, but there are certain things, the degradation of women and other things that are uniformly accepted as destructive. They are universal. And as the leader and as somebody who has been given a term by the President of the United States, we cannot be family values when we want a tax cut but not family values in what comes over during the time when the family is watching television.

So, you know, we are not talking about eleven o'clock, twelve o'clock, one o'clock in the morning. There really is no family hour anymore. And you are right, you know, last night when "The Diary of Anne Frank" was on. Great television. But I will tell you, you go home tonight at 8:30 or nine o'clock and turn on, without mentioning channels, and you are going to find a lot of really bad stuff.

And your child is not only watching it at your house, but there will be times—I do not know how old your children are—they are going to go over to other people's homes. It is an issue that I think you should be sensitive about and be willing to expend some of the capital that you garner in this job. Too many people save capital. It is the old saying, I do not want to cash my chips on this one. Sometimes you cash your chips when you leave this process, and someday you are going to look back and say, if I had only done something, I think maybe that would have changed.

INTERNET GAMBLING

What about this issue of Internet gambling? Does the FCC have any thoughts with regard to—there was the article in the New York Times last Friday about the greater use of Internet gambling, and also what about the issue of pornography on the Internet?

Chairman POWELL. Of course the most direct answer——

Mr. WOLF. Gambling and——

Chairman POWELL. Of course, the most direct answer is that we have virtually nothing to do officially with any of those things, given that we do not—we specifically do not have authority over the Internet, even to structural aspects of the Internet, we do not have regulatory authority over it. And we certainly have authority in the context of content or services that are offered using the medium.

I have only the kind of familiarity with these issues that any citizen would who might read the paper. We do not generally have an official function or activity that is focused on those issues.

I think that those issues have proven extremely challenging. I mean, all I can offer is that the Internet is going to prove a very, very difficult space for these kinds of concerns, because what makes it phenomenal and at the same time, dangerous, is that the intelligence of the network is distributed on the periphery, and rather than a central phone company or a central institution that you can point to and have some chokepoint for regulatory control, you have the intelligence of the Internet spread throughout the world in the hands of millions and millions of individual innovators who can publish and offer services and run services.

And I think this is going to be an enormous challenge for law enforcement, for national security, for, the heinous trafficking in pornography, for criminal activity, for fraud, because the traditional methods of policing such activity prove daunting and challenging in this space. As the prosecutors of Napster or anything else will find, it is quite elusive in its ability.

You can articulate the rule, but the actual effective policing of that rule proves phenomenally difficult. I think the answer rests somewhere in the use of technologies. But there are touchy issues there, too. I think that, for example, with respect to filtering technologies, which many of us use for our own kids and are hopeful—for example, we just implemented rules that the Congress did give us specific direction in the context of the Schools and Libraries Program so as a condition of Schools and Libraries E-rate grants now, you are required to demonstrate that you have Internet filtering software in place in the schools and libraries as a condition of the grant. That was a specific directive to us from Congress.

With respect to the other stuff, I think those issues will probably be in the hands of—the ones that have criminal implications—law enforcement authorities and perhaps to some degree when you get toward privacy, the Federal Trade Commission has some unique authority.

But I do not know that there is a central point right now in the U.S. government where all of those issues are subsumed in one place. I think pieces are where they have been traditionally.

Mr. WOLF. Last question and then I will recognize Mr. Serrano. With regard to the whole question of analog TV purchasing now for $200, $300 versus the digital $2,000/$3,000, do you have any thoughts about that? The timing, the target date? What do you see happening?

Chairman POWELL. To be completely candid, the idea of the transition reaching the penetration levels that are called for in the statute by 2006 are not achievable.

Nor would one expect them to be if you look historically at the deployment on a mass market basis of this kind of transition when color TV came into the market or that when TV came into the market in the first place, when CD players came in the market, VCRs. It generally is a much longer transition than the period that we currently hoped for in the current process.

When you look at how radical a transformation this is for a consumer, you are talking about an HDTV that is currently priced in the $3,000 range, and that is for one of them. The average American family has three to four televisions in their house. And that is a lot of swapping out going on.

I think that what we have to be very careful about as a government is that broadcasters have a dog in the fight, content providers, the consumer electronic folks have a dog in the fight. But the people who matter most are the consumers who we are going to push this on. And I think that we need to make sure that while we press for an efficient transition, we are careful to make sure that we do not, push consumers toward things that are not ready or that are inordinately expensive or to which they do not have anything to watch once they invest that expense.

And so I think that there is reason to be careful and cautious about the pace of this. I think it is a great technology and I think it is going to come. I think consumers are going to like it eventually and I think they are going to buy it. But I think that we have to let them come to it at a reasonable pace before we really in our haste say that we did it, push onto consumers products they are not ready for. And many good products are already out there, but there is going to be an early adopter curve when those prices have to get beaten down, the technology improved. And that is natural in any new technology. The first color sets were the worst ones. The last ones tend to be the best ones and the cheapest ones, and the same thing will happen with digital. We have already seen pretty big drops in prices.

But it has got some time to go. And so I tend to be a voice of caution, and sometimes criticized for it, that the people who are not at this table are the ones we are asking to go home and watch this thing, and we need to be careful about just in the name of getting it done that we are too aggressive.

Mr. WOLF. Mr. Serrano?

Mr. SERRANO. Thank you, Mr. Chairman. Let me just as an aside, Mr. Chairman, say that I am really beginning to more than ever like your style. You remind me of Ed Sullivan. [Laughter.]

Mr. WOLF. Ed Sullivan.

Mr. SERRANO. If you notice you will say I have one more question and then I will introduce—I will have Mr. Serrano. Then you say I have one more question, then I will bring on Mr. Serrano. Then one more question. Sullivan would come on and say, on tonight's show, Pearl Bailey with the great Duke Ellington Band. Then he would do a whole bit, go to commercials. Right after commercial, say Pearl Bailey coming up with the great Duke Ellington. Topo Gigio would come on. [Laughter.]

And a thousand Hungarian ventriloquists or something. And eventually Pearl Bailey would come in at the end of the show. But she was the star. So I thank you for the build-up that you gave me. [Laughter.]

PAY TELEPHONE ACCESS

Let me, in that vein, agree and join you on something, Chairman Wolf, and for the first time in public give another side to an issue you brought up.

First of all, I do want to publicly, on the record, join you on the issue of public pay phones. In the South Bronx, for the first time in a long time, I am seeing people at the very few phones that we have left in lines, the way you used to see in Manhattan years ago when all the businessmen lined up because they had to call their office or something. Because those folks do not have cell phones, and some of those folks do not have phones at home. They are the latest arrivals.

And in the inner city we have the problem of pay phones being removed, in addition to the other problem, which is that a lot of folks do not know about dialing a certain number or something, and the phone call could be $30 for three minutes or something. I mean, it is ridiculous. I have been caught in that, and so have many people.

So I join Chairman Wolf on the record saying that, we should not abandon or we should encourage pay phones. And I continue to believe that you have the way to encourage people as you through our government make it possible for some of them to become zillionnaires, I do not think it is improper to say, and by the way, you know where they should be looking.

BROADCAST CONTENT

Now on the issue of what goes on the air, I tend to agree with you that this is a very delicate situation and we have to be very careful. I know where the Chairman is going and I respect his views and I know that they are very sincere. But it is really where you are sitting. You know, I bring up every year the issue of the Howard Stern Show. The Howard Stern Show has set a record for being fined. I was shocked to find out from Chairman Kennard last year that the reason the Howard Stern Show gets fined is because people call up complaining. So he is kind of done in by the fact that he has got at least 50 million people listening to him every morning. Because if people do not complain, then you folks cannot react, which seems a kind of strange way to act.

But I am more troubled by some of the people I hear during the day, and yet I do not want them off the air, than I am by Stern. Talk show hosts who claim that liberal Democrats are anti-Amer-

ican trouble me, but they should stay on the air. Talk show hosts who say that the people in Vieques who want the bombing to stop are not patriotic and are anti-American, not taking into consideration how many of them or their relatives have died in our wars throughout the years, they trouble me.

Some of those shows where they say on today's show, women who have sex with their dogs while, you know, wanting to join a seminary or something. You know, I mean, I really do not want to see or hear that. But I know their right to be on the air.

So I still believe that it is—and here probably I am sounding more like a Republican than anything else—I still believe that it is up to mom and dad to know when to turn the dial and when to switch it off and when to control it. It is an ongoing battle. We do not know how to win that battle. I do not know myself how to win that battle.

But, you know, there is violence on TV, and I am not crazy about it. But sometimes I think there is more violence in the hockey game than there is on the regular TV show or on the news, so what do we do, start controlling everything? It is a balance. It is a real balance. I do not envy you every time you have to deal with this. I do not envy any of us having to deal with it. And it is a disagreement with the Chairman, but it may not be. It is just trying to get to this at all.

LOW POWER FM RADIO

On to one of my questions. One of the big issues last year was the whole issue of low power FM. Low power FM for communities like mine was great. The whole idea of the local church, local hospital, local college having their own station was just going to open up a whole new era for us and for those communities. And then we ran across and against the big stations who feel somehow we are going to interfere with them.

There was language put in the bill which modified certain provisions and so forth. I did not like that, but we went along with it.

Now there was supposed to be an experimental program to evaluate the potential interference of low power FM stations and to have an independent testing agency conduct field tests.

So my question is, what is the status of the evaluation, and when can the Congress expect to have the analysis of the results of the evaluation.

And also does the Commission have sufficient resources to conduct the evaluations in this coming year.

Chairman POWELL. Sure. A couple of quick things. First, it is important to recognize that the legislation that requires the testing does not prohibit the Commission from proceeding with, at least in our interpretation, the opening of licensing windows and licensing applications.

So in some ways, these things are on two tracks. That is the licensing is proceeding and we opened three filing windows. I think the fourth and fifth windows will be in June, and that will have covered the country for low power (LPFM) license applications.

The technical study has to do with an issue about how much spacing protection you have to provide between stations. We are required to make any licensing decisions with what we call third ad-

jacency, which is greater protection than the original proposal, until the completion of this study.

The study has to be procured in the same kind of government procurement way. We are not doing it independently. The study has to be done by an outside party.

We are in the process of developing the technical specifications, all the stuff that goes into creating and letting out a contract for the technical studies.

We hope that that will be completed—I do not think I have a good date, but I think, we are trying to complete that process pretty quickly.

I think that the bad news is that if you comply fully with the way that the testing is laid out on the statute, it is going to take a long time.

It is apparently not permitted that you can just do it in a laboratory setting. It requires testing in real conditions, which means there are actual licensees operating and you test in real environments, and you are required by the statute to test in different environments like rural, urban, et cetera.

So there are a lot of dimensions to the testing that are going to have to be satisfied and I think that is going to take a fair amount of time.

And then it is important to recognize that the way the statute is written is that when the tests are completed, we merely provide that to Congress.

And so whether there are any modifications to allow more stations is going to be a congressional judgment and not an FCC judgment.

So in some ways, the long and the short of it is, even though the test is required and we will have to proceed, et cetera, we are able to continue the LPFM licensing process within the one technical constraint now, and we will proceed with it.

And whether Congress ultimately allows more stations, this technical thing really goes to that. I mean, if you put in a third adjacency, there are that many fewer LPFM stations you can have in markets.

You know, we will await the completion of the study and whether Congress authorizes us to remove the technical barrier——

Mr. SERRANO. And you authorize how many right now under the current law?

Chairman POWELL. I do not know the number off the top of my head. The move from second adjacency to third adjacency cuts a significant number out.

You go from somewhere in the neighborhood of a couple thousand nationwide to a thousand or under probably with the adjacency and it has a lot to do with different markets. It depends on how concentrated an area is.

Mr. SERRANO. Right.

Chairman POWELL. In an area like New York, it can make a significant difference because it is such a concentrated commercial marketplace that if you have projected a third adjacency, there are urban markets or concentrated markets in which that will knock out the possibility of any stations.

There are lots of parts of the country that even under the rule before were not going to have a meaningful opportunity because of the concentration of their markets, which I would caution is not all bad. That is, there are a lot of very good community-oriented commercial stations that are operating not at the high end—you know, they are not clear channel—but they are maybe that Spanish broadcasting station in New York that has to compete for advertising to maintain its commercial viability and we do want to be careful that we do not introduce a free service that chips away too far into the commercial viability of stations on the small market side who then, you know, do not have as much advertising base as they did before, and then we lose them too.

That happened once in the Commission's history. We had another service where there were radio stations operating. We saw lots of stations dying as a consequence. We had to pull back on that once. And so there is a reason to be cautious here, but things are going to proceed.

Mr. SERRANO. So it is your sense, which I am glad to hear, because, in all honesty, I did not understand it that way. Notwithstanding the testing that has to be done, the analysis that has to be done, you are still proceeding in putting forth, issuing the licenses?

Chairman POWELL. Yes. And it is our interpretation of the testing that you almost have to because you have to have real operating stations against which to test. Not a laboratory where we run interference tests and say that it is okay or go out with an antenna and hold it up for a minute and say that it is a test.

What we interpret the statute to be is that there is a real station operating in a market, and then we go out there and we look at what the interference characteristics are.

Mr. SERRANO. Is the industry somewhat satisfied by what we did last year and not jumping up and down? Or they still would rather see all these people disappear?

Chairman POWELL. I cannot really speak of the industry. They certainly pushed this change. I suppose that they are satisfied with it in that regard. There are certainly some who would wish there was no service at all.

My own interpretation is there are some who just do not want them, and also some who I think it would be unfair to say do not have genuine concerns about their viability both economically and technically if the service is not carefully curtailed.

For example, some of the most vocal critics I got who came to see me were in small markets like rural North Carolina, who were very concerned about, with a small population, if the church got a radio station and it was broadcasting the service on Sunday, that was a big part of what they did on Sunday and was a good part of how they got their advertising revenue.

They were very concerned that you are going to divide the market between us, and we will go out of business.

Those are tough judgments but I think that we will ultimately work out a reasonable situation, then we will have experience with it. And if it proves to be insupportable——

REORGANIZATION OF THE COMMISSION

Mr. SERRANO. You know, I think that this is one of the more exciting things to come along in a long time. I think it gives an opportunity for local communities to have a stake and to have some power and to have some involvement.

Let me just ask you, Chairman Powell, your testimony refers to your proposals to reorganize the Federal Communications Commission in two phases. A short-term phase one restructuring, and a longer range phase two plan.

Could you tell us more about what you hope to accomplish in that proposed reorganization, why it is necessary and when we will see the details of the proposal as well as more specific time line?

Chairman POWELL. The proposal is an effort to examine the way the Commission should be organized, given convergence in the marketplace.

I will give you an example to bring meaning to that. If you are a television viewer, you might watch cable, you might watch over-the-air television, you might get a satellite dish.

As far as you are concerned, those things are substitutes for each other up to a point. You know, they are competitors to each other. The cable guys try to get you to subscribe instead of watching over the air. The DBS people try to get you to take them instead of—but yet we have every one of those services in a different bureau.

And they are regulated differently and it is difficult to create harmonization across those services because they are in different organizational buckets.

So this is actually proven to be something industries sometimes like because they are able to have advocates for their position within the Commission.

If you are a broadcaster, you like that broadcasting lives sometimes in mass media because then you have a bureau of your perspective where you do not have a leader or a chief who maybe has more responsibility looking over industries that compete with each other and making sure those judgments are harmonized.

Spectrum is another example, in response to the Chairman's question. We will look at whether there are ways to have more coherence to licensing by not having licensing being divided across bureaus completely just based on where they come from historically. So that you have broadcast spectrum and satellite spectrum over there, et cetera, et cetera.

So most of that is the driving impetus for at least the examination.

I designed it in phases because I think that reorganization is a tough thing to do responsibly, and I think that we are building in milestones for public comment. We just, I think last week, issued a press release inviting public comment on proposals for reorganization.

We have a union to work with. We have to be cognizant of their concerns, the employees. But it is not an effort to cut the agency dramatically or dislocate people dramatically, but basically re-optimize it for the current realities.

Phase one is something that I fully intend to be the first step of reorganizing functions. I do not want to get into the details just

yet, but maybe some reorganization changes that occur on a short term frame. In my mind, that is kind of a three- to four-month period.

Phase two is an examination of what is the agency? Really, those are the things we think probably need to be done sooner rather than later.

Phase two is sort of the idea of taking a very long view of looking at the market, where it is going, what the trends are, and how is the best way for the agency to be optimized, and we think that there is probably room there for more dramatic change. It may be a phase that takes a couple of years.

We are pretty optimistic about trying to make sure we do as much of it as we can under my watch, and under the shorter time frames, given the market demands. But the longer those will be a more serious examination of putting together the competitive services in similar buckets and functions in more similar buckets.

I think at the earliest that is a year. I think at the longest, that is three years.

And you never know. You never know what issues you run into as you pry it open. But I do not want to do it hastily or irresponsibly.

Mr. SERRANO. Do you envision that any of these changes would require congressional approval?

Chairman POWELL. Yes, I think so.

Mr. SERRANO. If so, will we be having any legislation coming soon?

Chairman POWELL. I do not know if real soon, but in a government agency, we can not even change the name of an organization block without some blessing of the Congress. And I think that certain structural changes would absolutely require a reorganization change through the authorization/appropriations process. And we would undoubtedly submit them.

But we intend to be a lot more proactive than that. We want to do it partly in partnership with Congress, not just submit it to you. So we have been beginning the process of soliciting input from Congress and their staffs as to things that they have seen that they would like to see improved and get included in the process.

So we will be more than happy to include you in that, and will, and so it will not just be "surprise, here is the reorganization plan." I hope that it is something that you are familiar with as it works its way through the development process.

Mr. SERRANO. How about industry and consumer representatives?

Chairman POWELL. This is part of what is, the first salvo—the release last week of the invitation for public comment. It is one way of soliciting input broadly throughout the country.

We fully expect that we will receive comment from both industry and consumer groups.

We probably along the way will hold informational forums, developmental discussions that will probably include components of that. We will do that internally.

Our view is basically we have an internal buy-in obligation and an external buy-in obligation. The external one includes industry and consumer oriented groups and the internal are employees and

our staffs and the anxiety that change creates, making sure that they buy-in and at least have a good understanding of what we are doing and why we are doing it.

Mr. SERRANO. One question. There is a group in New York, NewsCorp, who wanted—you laugh——

Chairman POWELL. There is a group all over the world called "Newscorp."

Mr. SERRANO. That is that gentleman's group, right?

Chairman POWELL. Yes, that would be his group.

Mr. SERRANO. Okay. The reason they call me is because they are opening a newspaper plant in the South Bronx, but their question I think I can ask in the broader term.

Which is, with the changing of the guard, which is very natural at this time, the beginning of a four-year period, and the Administration having to name new Commissioners and so on, there are items that are pending.

Do you see this as a problem? Is it going to take a while to get some of the things that are before the Commission taken care of?

Chairman POWELL. Some of them yes, some of them no.

You know, we try to plan for Commission transitions. It is often difficult to do. We are about to lose two members completely.

We have already lost one, and we are one down anyway, so we have three brand new members that could arrive any day. They have had their confirmation hearings. Purportedly, there is mark-up this week. So it is anyone's guess from that point on how quickly they will arrive.

We try to clear, as aggressively as we can, big important items that would require a major reinvestment of learning and time before the new commissioners arrive. And number one, I do not want to do that to them. I would hate to arrive and be told I have a major transaction that I have to get on top of in a matter of days.

We just do not want things that have been around a long time to get trapped in the transition. I suspect that for the most part we will be successful. There is always a possibility of things that just cannot get completed. One of the reasons is, while I am the Chairman, I have colleagues who can vote or not vote at their discretion. I can cajole and push and emphasize that they get something done beforehand, and sometimes they will and sometimes they will not.

The transaction you speak of is restricted. I cannot talk about the details but it is before the Commission. It is one of those that I sincerely hope we will get done beforehand. It is in the hands of my colleagues, and I have certainly urged them to try to do this.

But, the issues are complicated and they may or may not feel comfortable concluding it before the Senate acts on the nominations, but we are going to try.

ENFORCEMENT AND FINES

Mr. SERRANO. Mr. Chairman, I have a couple of questions that I am going to submit for the record, but I have one last question. It has to do with fines.

You have stated that you support increasing the FCC's enforcement ability through an increase in the maximum level of fines the

FCC can charge companies violating the 1996 Telecommunications Act.

Currently, the maximum level for a fine is $100,000 for a violation, which may be seen as a cost of doing business by the major telecommunications companies.

What do you see as a more appropriate level of fines, and would the Commission require an increase in enforcement funding in order to implement any increase in fines?

Chairman POWELL. Well, our proposal, which we submitted in the form of a letter to leaders in Congress, was that we think we described it at a minimum of $10 million. I certainly would not object to any order of magnitude above that if the Congress saw fit. But I think that it is the minimum required to be an effective deterrent against the kind of decisions that companies are faced with.

The proposal also includes the possibility of other enforcement flexibility. Like a lot of times we get trapped by the Statute of Limitations. It is fairly short.

If a company wants to, by the time they drag you around, you run out of the clock sometimes. It is an age-old tactic but our statute of limitations so short. I think they are a year at the most on these things and by the time you have the complaints and you do the discovery, people start racing you to the door on the time.

There are also arguments about whether these should always be punitive fines, whether sometimes they should be compensatory so that the harmed carrier actually gets some retribution for its losses. Those are the proposals.

I think they will make a meaningful difference if Congress sees fit to enact them. It has been a deficiency I think in the law for a little while and so we are pretty supportive of that.

On your questions about resources. It is not been what we have focused on, we have not yet seen the need to say we need a lot more attorneys or a lot more personnel resources to carry that out. That is a possibility if we are able to actually increase our enforcement effectiveness and it starts to become a resource issue, we certainly will come up and talk to you about that. That has not been what we have chosen to lead with.

We think that we have a lot more progress to make before we start arguing for it in a resource sort of way.

Mr. SERRANO. Well, I will submit my last question for the record, Mr. Chairman. I want to thank you, sir, for your testimony today. And I know we have a lot of issues I would like to follow up on.

But I understand the difficulties you face, the excitement of the job you have, and I can assure you that while the FCC is not an agency that is mentioned day to day in communities like mine, I believe that it is one that can make a major difference in the future of areas like the Bronx.

So I spoke to your father about this, and he agrees. [Laughter.]

Chairman POWELL. I agree with everything he says.

CLOSING REMARKS

Mr. WOLF. In closing, let me just, we thank you. I want to just follow up a little bit on what Mr. Serrano said to just put my side of the point in here.

Some of the stuff on television is having an impact on our society, and for adults to deny it is unbelievable. It is having a negative impact.

Secondly, I am disturbed over the burden that you put on mothers and fathers. I am a mother and a father. My mom worked, came home, my dad was a policeman, and we had five children, but we were not everywhere.

But I have heard the people say, you know, we ought to do this but yet there is nobody home in the family. So you can give moms and dads a little bit of a help.

And a single parent, you know, the toughest job in the world is not the Chairman of the FCC and it is not a Congressman; it is a single parent. It is not the president of the United States. It is a single parent.

And you can do something to help that single parent. And I think for the FCC to require them to provide tapes and times and dates, I mean, they do not carry tapes around wherever they are. Sometimes they do not even have a tape recorder.

I mean, I think you can make it easier for them, the FCC can make it easier.

You are not changing the standards, you are just helping out a little bit.

And lastly, you have been given a great opportunity I think by speaking out because moral leadership, bully pulpit, the president, whatever, can make a tremendous difference.

Many times even a difference that you will never be able to quite see but you will know eventually out there, because of a comment that you made or a speech that you made, or something, a life has changed and things have gotten better.

And so, you know, with that, I do appreciate your testimony and the hearing is adjourned.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

June 26, 2001

The Honorable Frank R. Wolf
Chairman
Subcommittee on Commerce, Justice, State, the Judiciary
and Related Agencies
Committee on Appropriations
U. S. House of Representatives
H-309 Capitol Building
Washington, D.C. 20515-6017

Dear Chairman Wolf:

This letter transmits my written responses to the post-hearing questions posed by you and various Members in connection with my May 22, 2001 appearance before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies.

Thank you for the opportunity to respond to the issues and concerns in which you and other Members of the Subcommittee are interested.

Sincerely,

Michael K. Powell
Chairman

enclosure

cc: The Honorable Jose E. Serrano

QUESTIONS FOR THE RECORD
FOR
MICHAEL K. POWELL, CHAIRMAN,
FEDERAL COMMUNICATIONS COMMISSION

CHAIRMAN FRANK WOLF

Question 1:
Chairman Powell, you propose a very proactive policy to encourage innovation and competition but you give at best, a nod to the protection of the users of this technology. Kids use all kinds of communications technology. But this advance also exposes children to pornography and violence. Your most recent Policy Statement on Broadcast Indecency makes clear that you only punish those who violate the narrow constitutional definitions of pornography. And you state that you do not monitor the industry. Why not? Is there no way to conduct random monitoring that might deter others from broadcasting matter that is not constitutionally protected?

A number of judicial cases interpreting the FCC's authority to enforce the statutory prohibition on broadcast indecency have instructed the Commission that because indecent speech is entitled to full constitutional protection, it may be regulated only by the least restrictive means necessary to promote the state interest in protecting children. *See, e.g., Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995). In addition, Section 326 of the Communications Act prohibits the Commission from censoring broadcast material and from making any regulation that would interfere with freedom of expression by broadcasters. With this in mind, the Commission's policy for many years has been to act on complaints about allegedly indecent broadcasts, but not to affirmatively monitor for such material. While it might be possible for the Commission to monitor, we are concerned that such a program would be subject to charges that it infringes on First Amendment rights of broadcasters by creating a significant chilling effect on all broadcasters' speech. In addition, the Commission's policy of acting on complaints rather than monitoring helps ensure that the agency is enforcing the community standards for indecency. Finally, it is not clear that random monitoring would have any deterrent effect and, thus, it may be better to focus our limited resources on programming that the public complains about.

Question 2:
It appears your official guidance requires the public must not only complain but they must provide you with tapes and times and dates. Is it possible to develop a realistic, user-friendly way for parents to protect their children?

In implementing the indecency statute, the Commission attempts to balance two important values: the need to protect children and the right of free speech. With these values in mind the Commission takes enforcement of broadcast indecency very seriously. The Commission's staff reviews each complaint it receives to determine whether the material meets the indecency standard. In this regard, it is important to recognize that, consistent with the jurisprudence in this area, subject matter alone does not render material indecent—context is key. In light of this, it is imperative that the Commission has

sufficient information regarding the actual words and language used and the meaning or context of the words or language used. This is why the Commission *generally* requires complainants to submit a full or partial tape, transcript or significant excerpts of the material allegedly broadcast. It is not true that we always insist on full tapes of transcripts. If a complainant has provided sufficient information regarding the language and context of the material allegedly aired, we have investigated and taken action.

Section 503(b) of the Communications Act requires that we cannot issue a fine without knowing the date of the violation, and we need to know the time because there is a 10 p.m. to 6 a.m. "safe harbor" established by the Congress and the courts in which indecent material may legally be aired. Many complainants are able to comply with these procedures. The Commission has taken action in response to complaints filed in accordance with these procedures. Thus far, this year, for example, the Commission's Enforcement Bureau has issued 25 letters of inquiry to broadcast stations in response to indecency complaints.

Finally, with regard to television, V-chip technology now required for almost all TVs provides a good tool for parents to protect their children. The industry has developed a rating system for programming that, in conjunction with the V-chip, provides parents with a means of protecting their children from material the parents do not wish them to see. Such an approach provides a constitutionally permissible means of protecting children.

Question 3:
No one in this room can tell me that obscenity and violence over the airwaves do not have an impact on the behavior of many children. Is a "sit and wait for a complaint" really the best way to address this problem?

Values and viewpoints about what constitutes unacceptable violence or indecency varies widely in our diverse nation. Moreover, the Constitution embodies the judgment that government should be restrained in making those judgments for our citizens and should do so only in the most compelling circumstances. A complaint-driven approach ensures that government is responding to material that is offensive to the public, rather than government imposing, in the first instances, its own views and definitions on the public, which is what the First Amendment most condemns.

Indeed, as noted above, the courts have instructed the FCC that indecency enforcement must be narrowly tailored to use the least restrictive means of fulfilling the compelling government interest in protecting children from inappropriate material. Any revision of the current FCC enforcement approach to include, for example, active government monitoring of broadcast speech would likely lead to a new challenge that the program could have a significant chilling effect on all broadcasters' speech and, because of its unfocused nature, would not be the least restrictive means of achieving the objective. On the other hand, complaint-based enforcement, where listeners and viewers identify particular stations as candidates for remedial action by the Commission, has been judicially sustained as the least intrusive means of enforcing the indecency proscriptions.

Question 4:
You do not regulate the Internet. But the lines between the uses of different kinds of technology for communications purposes have begun to blur. The Internet has clearly become a vehicle for pornography, gambling, and other kinds of criminal behavior. The explosion of child pornography is especially disturbing. Who is taking a look at this problem? As the FCC stands as the chief regulator of communications, your agency stands in a unique position to speak out against the criminals who use the web to push pornography and gambling. Do you plan do that?

The Department of Justice has jurisdiction to prosecute criminal behavior on the Internet. Because the FCC's role with regard to the Internet is limited to the facilities used to provide Internet service (and not the content that flows over it), the agency is not in a position to take action against Internet pornography or gambling.

Question 5:
Your vision for the FCC would encourage broad access to the Web. You have the best legal and engineering minds in the world. Might they help you devise a technologically and constitutionally valid mechanism for monitoring the illegal use of the Internet? How might FCC experts assist law enforcement officers shut down this criminal behavior?

The FCC has a long history of working successfully with law enforcement officials in addressing unlawful behavior. The Department of Justice conducts criminal prosecutions on the basis of evidence that is deemed to be admissible as determined by courts of competent jurisdiction. Where it would be practical, the Commission could assist the Department as long as such assistance would be consistent with statutory requirements under which the Commission and its staff operate, including relevant appropriations authorizations.

Question 6:
I understand you recently sent Senator Burns a proposal for a program called "Excellence in Engineering". We understand you did not intend to suggest an earmark for a particular project. The Committee would be strongly opposed to any earmarks within the FCC budget. As you well know, we are approached on a daily basis to address the use of Appropriations Acts for specific beneficiaries. Our preference is to keep such requests to a minimum to allow the Commission to continue to make decisions about the best use of its resources. Has the FCC provided technical assistance to other members, and if yes, might we receive copies of such proposals?

The Excellence in Engineering program is designed to ensure that the Commission maintains a high level of technical expertise so that it is at least as fluent in technology and engineering issues as are the entities it regulates. Toward that end, the program contemplates the hiring of additional engineers and other technical experts, the development of a comprehensive core and continuing education program for the agency's technical staff and the upgrading of the agency's technical equipment at its Columbia, Maryland laboratory and field enforcement facilities. Neither the proposal shared with Senator Burns nor the Excellence in Engineering program as it is currently operating contemplates the earmarking of funds for any particular entity and we have had no discussions with anyone regarding any such earmarking. Rather, the program is being

developed by senior agency officials, in the exercise of their independent judgment and in conformance with federal procurement requirements, so as to secure the best possible talent, training, and technical equipment. The Engineering in Excellence program is the only technical assistance funding proposal the Commission has been requested to submit or has submitted to a Member of Congress.

Question 7:
Have you followed up on my thoughts about some kind of peer review board to establish guidelines for the selection of appropriate schools for an "Excellence in Engineering" program? Have you had further discussions with members of the Senate on this question?

The Office of Engineering and Technology is considering the most effective way to implement your suggestion about having a peer review board establish guidelines for the selection of schools to participate in the Excellence in Engineering program. The agency already has a standing board of senior engineers representing the major operating bureaus. This engineering board meets regularly to address issues relating to the recruiting and training of engineers at the agency. The engineering board has considered a variety of factors in the selection of institutions to administer engineering training. These factors include whether the institution has an established program for communications engineering, the reputation of the program and of individual faculty members, the availability of faculty with expertise in specific engineering courses and whether those individuals are able to meet the agency's required timeframe. The board could readily develop a set of formal guidelines to aid in the selection process. The agency has not to date held any discussions with members of Congress on this issue, but will certainly keep all interested parties informed as plans for the program are being developed.

Question 8:
On April 11, 2001, the Committee approved a reprogramming of funds in the amount of $7.4 million of fees collected in prior years above the levels cited in Appropriations Acts. Please tell us whether and how the funds have been obligated.

The Commission has allocated $2.6 million of the available regulatory fees to address the requirements set forth in Section 632 of the Appropriations Act. A federally funded research and development company ("FFRDC") is being retained to design the test standards and to do a market survey to identify companies that can perform the test. We expect to make the contract award in the fourth quarter of FY 2001. The FFRDC will also develop an estimate of the cost to conduct the tests, which will be delivered to the Commission. The FFRDC will also assist with the development of a draft Request for Proposals ("RFP") for full and open competition of testing companies. The Commission will then proceed with the tests after the cost estimate has been developed.

The Commission has allocated $4.8 million of the available regulatory fees to address critical information technology initiatives. The bulk of the money is targeted for contractor services to enhance numerous Bureau and Office systems critical to the mission of the agency. These system enhancements include responding to recent rule changes and international treaties, and improvements to the agency's licensing systems and consumer

information activities. The remaining funds are being used to support central information technology activities. The agency has developed a plan for obligating and accounting for these funds prior to the end of this fiscal year.

Question 9:
I have received a number of requests regarding the Northpoint matter currently pending before the Commission. I would ask that you reiterate for the record your timetable for disposition of all of the issues raised by the Northpoint application for use of the spectrum.

The 12.2-12.7 GHz proceeding is one of the most complex allocation proceedings before the Commission. Three services could potentially occupy this spectrum in a complex sharing arrangement that involves direct broadcast satellite service ("DBS"), non-geostationary ("NGSO") satellites, and terrestrial users, such as Northpoint (as part of a new terrestrial fixed multichannel video distribution and data service ("MVDDS")).

Several matters affect the Commission's ability to address these applications. For example, Section 1012 of the "District of Columbia Appropriations Act, 2001," requires the Commission to provide for independent testing for interference potential of any terrestrial service technology proposing to use the direct broadcast satellite frequency band (12.2-12.7 GHz). This requirement has been an extraordinary undertaking, to ensure that the technical interference considerations have been fully vetted and considered. The independent tester, MITRE Corp., subsequently completed the required interference study and submitted its report to the Commission on April 18, 2001. The Commission placed the report on public notice on April 23, 2001 and sought comment on the report. Comments responsive to the study were due on May 15, 2001 and replies were due on May 23, 2001. The Commission's engineers are currently in the process of finalizing their evaluation of the engineering questions for the purpose of making a sound judgment about technical interference.

Another set of issues we have to work through that are just as significant as the technical interference question, arise from the different regulatory schemes applicable to wireless land-based and satellite-based services. Because as noted above, three services could potentially use this spectrum, the Commission must determine the applicability of the distinct statutory frameworks that are used to license spectrum for domestic and international satellite services as well as terrestrial services. The Balanced Budget Act of 1997 requires the Commission to license by competitive bidding spectrum for which mutually exclusive applications are accepted for filing, unless an exemption applies. On the other hand, the Orbit Act does not allow the Commission to use competitive bidding to license spectrum used for the provision of international or global satellite communications services. Thus, the use of the spectrum for multiple types of services presents novel issues.

Resolving these issues is at the top of my agenda. Please note that it is hard to predict how long it will take to complete the technical analysis. However, I am optimistic that the Commission will resolve the terrestrial applications, including Northpoint's application, by the end of this year.

CONGRESSWOMAN LUCILLE ROYBAL-ALLARD

On April 30, hosts of the KFI-AM Radio "John and Ken Show" in Los Angeles made disparaging comments to immigrants waiting in line to file their INS 245(i) program application. The hosts handed out government cheese to the waiting applicants and mocked them for waiting until the last possible day to file their application. They also urged non-English speakers to leave the country. In some cases, they discouraged applicants from filing out the required forms by telling them that the lines were closed. All these questionable actions and comments took place during live "on air" broadcasts.

Question 1:
What authority does the FCC have over the content of broadcasts?

The Commission is prohibited by the First Amendment and Section 326 of the Communications Act from censoring broadcast matter and from taking action that would interfere with the freedom of expression of broadcasters. The exceptions to this broad proscription are generally based on specific statutory provisions—for example, indecency, political broadcasting, children's television programming, and station-conducted contests.

Question 2:
What oversight, if any, does the FCC have over the conduct of those conducting radio broadcasts?

If a broadcaster violates a provision of the Communications Act or a Commission rule, the Commission can take enforcement action including revocation of the broadcaster's license, issuing a cease and desist order, assessing a monetary fine or admonishment. Moreover, under Section 309 of the Communications Act, the Commission may consider the licensee's conduct as part of its public interest determination at license renewal time.

Question 3:
Does the FCC issue content guidelines to radio broadcasters? If so, please summarize the guidelines.

Generally, the Commission does not issue content guidelines to radio broadcasters. Rather, any specific obligations regarding content are spelled out in the Communications Act and other statutes and the Commission's rules. On occasion, the Commission has issued Policy Statements relating to those obligations. Earlier this year, for example, the Commission issued a Policy Statement regarding Broadcast Indecency. This document discusses the statutory basis for, and judicial history of, indecency regulation, describes the analytical approach the Commission uses in making broadcast indecency determinations (including comparisons of selected rulings) and describes the Commission's broadcast indecency enforcement process. The Policy Statement does not establish any new standards for indecency.

Question 4:
Does the FCC issue conduct guidelines to radio broadcasters? If so, please summarize the guidelines.

Broadcasters' obligations as licensees are spelled out in the Communications Act and the Commission's rules. Accordingly, the Commission does not issue separate conduct guidelines to radio broadcasters.

Question 5:
While protecting the constitutional right to free speech, does the FCC guard against broadcasts of hate speech or language that demeans or degrades a group of people? If so, how? If not, why not?

Although we understand concerns about hate speech and other statements that are offensive to particular groups of people being broadcast over the public airwaves, the Commission is generally prohibited from involving itself in the content of specific programs or otherwise engaging in activities that might be regarded as censorship or interfering with the right of free speech. *See* Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326. The Commission generally may not take action against a broadcaster simply because it engages in speech that is hateful or offensive to particular individuals or groups of people. Such speech is constitutionally protected. If, however, the offensive speech presents a "clear and present danger" to life or property, the Commission may take action. As the Commission has stated:

> **It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve 'a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . .' This most assuredly does not mean that those who uphold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even highly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial.**

***Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190, 191-192 (1966). In addition, to the extent the offensive language also includes reference to sexual or excretory matters such that it is indecent, the Commission may also take enforcement action on the broadcast of indecent matter between 6 a.m. and 10 p.m.**

Question 6:
What action, if any, could the FCC take if it is determined that the John and Ken Show lied or spread misinformation that caused residents to miss a federally mandated application deadline?

Given the First Amendment and Section 326 of the Communications Act, the FCC generally does not in the first instance make a judgment as to whether broadcast material is intentionally or unintentionally accurate or inaccurate. However, if the station were convicted of a felony based the events on the John and Ken Show, it could be subject to penalties including revocation of its license. As part of the licensing process, the Commission, in making a public interest determination, examines whether an applicant or licensee has the character qualifications to hold an FCC license. Under the Commission's *Broadcast Character Qualifications Policy Statement*, the Commission does consider criminal felony convictions in evaluating a licensee's character. A Commission determination that a station's criminal conviction renders it unqualified to hold an FCC license could serve as the basis for sanctions including revocation of the station's license under Section 312 of the Communications Act.

TUESDAY, MAY 22, 2001.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

WITNESSES

LAURA S. UNGER, ACTING CHAIRMAN, UNITED STATES SECURITIES AND EXCHANGE COMMISSION

JAMES M. McCONNELL, EXECUTIVE DIRECTOR

INTRODUCTION

Mr. WOLF. The hearing will begin.

We want to welcome Ms. Laura Unger, the Acting Chairman of the Securities & Exchange Commission. She is accompanied by James McConnell, the Commission's Executive Director.

And today's hearings will focus on the SEC's budget request for fiscal year 2002.

Fiscal year 2002 budget request for the SEC totals $437.9 million, an increase of $15.1 million or 3.6 percent over the FY 2001 program level.

The Commission is responsible for the oversight of the nation's financial markets. Our financial markets have been transformed over the past three years, both by phenomenal growth and by technological advances.

It is an extraordinarily dynamic environment, one that provides no shortage of management challenges for you and the oversight challenges of the Congress.

I have other things to say, but let me move on to a couple of points.

FOREIGN CORPORATIONS AND HUMAN RIGHTS

Before you begin your testimony, I would like to commend you, David Martin, and the whole SEC on the important actions you have taken recently on increased enforcement of disclosure rules.

Foreign corporations play a direct role in human rights abuses in Sudan have been able to offer securities to American investors, and as a result, these investors are unwittingly helping to subsidize these atrocities.

The SEC has a responsibility and an obligation to require these corporations to disclose such involvements to U.S. investors.

THE IMPACT OF SEC'S DISCLOSURE RULES

I am pleased by the progress you have already made, and we will continue to insist and urge the SEC and your new chairman, when confirmed, Mr. Pitt, to fully exercise existing authorities to inform and protect American investors in this area.

I believe that you have exercised your maximum efforts to be responsive to these legitimate market concerns and dangers to our national security and fundamental values.

And over time, I believe five, ten, 15 years from now, when you look back on this, you and others will believe that your actions will have played a vital role in saving lives in Sudan and other countries and I think this will really be an inspiration.

Last night was the second night of the Diary of Anne Frank. If anyone in 1943 knew that companies were doing business with Nazi Germany and they were on a U.S. stock exchange, we would want to know about it.

With the atrocities taking place in Sudan, 2.2 million people killed, Christians, Muslims and animists. What is being done by the Khartoum Government is barbaric. It is a form of genocide.

Anyone who raises any objection to you, you just tell us about it. We are going to ask them, particularly if they are government person, whether they be at the White House or the Treasury Department or the USTR, or anybody else. Before they discuss this with us, I am going to ask them to go into the Holocaust Museum and look at the genocide exhibit.

This Holocaust Museum has now issued a genocide warning with regard to Sudan. And anyone who has not been in the Holocaust Museum ought to go in. In fact, government officials ought to go in over and over and over.

Just sitting where you are the other day, Louis Freeh said, to his credit, that every time a new class of FBI agents graduate, he requires them to take a tour of the Holocaust Museum. As you enter the Holocaust Museum, there is an exhibit now on Sudan where they have a genocide warning. They do not do that very often. This may be the first time ever.

So anybody that watches the Diary of Anne Frank and reads the new book out talking about some companies that were doing business in Nazi Germany, if anyone can go over to the Holocaust Museum and see that, the genocide warning with regard to Sudan, then we can talk about this issue.

But I personally think what you did was very important. There is a great statement by Bobby Kennedy, where he talks about moral courage being a rarer commodity than bravery in battle.

The fact that you and your employees at the SEC did this is very important. The sum total is that you will save lives and you will help the national security of the United States.

So I think you will be proud of this for a long time and I will not quiz you too much on Mr. Pitts' feelings about this, but when he is ready to come up here, I do want to talk to him. Because if there are any repercussions, if there are any pressures brought against anybody that has been involved in this, we are going to ask the FBI to investigate. We are going to ask the Inspector General to investigate, and we are going to be involved.

And so to you, and to your employees on behalf of the people of Southern Sudan and the people of many other countries that are going through a very difficult time, thank you very much.

Mr. WOLF. Mr. Serrano is coming and at that time, we can recognize him if he has any statement. He had another emergency meeting, but with that, you can just proceed, and you can read your whole statement or you can submit it for the record and summarize, whatever you see fit, but welcome.

Ms. UNGER. Thank you, Mr. Chairman, I appreciate your kind statement. Although the Commission touches on many investors' lives, it is rare that we have gotten credit for saving people's lives, so I am glad to have the opportunity to work with you on that.

I have a short oral statement, and then I have a longer statement that I would like to have included in the record, if that is okay.

Mr. WOLF. Sure, without objection.

Ms. UNGER. I do appreciate the opportunity to testify on behalf of the Securities & Exchange Commission in support of the President's fiscal 2002 budget request.

As you noted yourself, the SEC today faces some of the most complex and difficult issues it has ever considered. More Americans invest in our securities markets than ever before. Twenty years ago, only 5.7 percent of Americans owned mutual funds. Today, some 88 million shareholders, representing 51 percent of U.S. households, hold $7.4 trillion in mutual funds.

This exceeds by about $4 trillion the amount on deposit at commercial banks, and surpasses by $2 trillion the total financial assets of commercial banks.

At the same time, our markets continue to be transformed by the rapid pace of technological change in recent years. New technologies, new market entrants, and new financial products are reshaping our markets. For example, electronic trading platforms, some of which did not exist just a few years ago, are now matching buyers and sellers of hundreds of millions of shares every day anonymously and for fractions of a penny a share. Consider also the QQQ, an index product that tracks the NASDAQ 100. This instrument did not exist two years ago, but yesterday it traded almost 85 million shares, more shares than were traded in Microsoft, G.E., and IBM combined.

No less important, our markets today are increasingly global, a trend that most expect to accelerate in coming years. Globalization affects almost every aspect of the SEC's work. We must be able to regulate markets without boundaries and investigate and prosecute securities fraud irrespective of where that conduct originated.

All of these developments raise complex and critically important challenges that the SEC must be prepared to meet. At the same time that our markets are undergoing such dramatic change, the SEC is straining to keep pace. We have about 3,000 staff. The SEC is a very small federal agency. The industry that we oversee, though, grows daily and includes nearly 700,000 registered representatives employed by 8,000 broker dealers, some 15,000 companies that file reports with us, about 30,000 investment company portfolios, and almost 8,000 registered investment advisors.

Over $41 trillion in stocks are expected to trade hands this year on the New York Stock Exchange and the NASDAQ. Against this

backdrop, the President's fiscal 2002 budget requests an appropriation of $437.9 million for the SEC. As you noted, this is only 3.6 percent more than our fiscal 2001 enacted level of $422.8 million.

The $437.9 million request provides the resources necessary to meet the Commission's needs. It is a zero growth budget that funds all but $5.2 million of the Commission's cost increases with no programmatic staffing increases.

We support this request. Ironically, though, we can only manage at this level because of the severe staffing crisis that we continue to face. In the last three years, more than 1,000 SEC employees, which is over one-third of the Agency's staff, have left the Commission, which is a rate double the government average. Not only did we lose too many employees, but we also struggled to find qualified people willing to work for the salaries and benefits that we can offer.

Over the last several months, the SEC consistently has had approximately 280 vacant positions, amounting to almost nine percent of our hiring ceiling. Because filling open positions has proven to be so difficult, we intend to use staffing funds to cover some of our mandatory costs for fiscal 2002. However, straining the SEC's growth and relying on cutting unfilled positions is not sustainable over the long term.

In the coming years, I believe the SEC will need staffing increases to meet the challenges that I described earlier. In addition, staffing increases will be needed to meet our increasingly complex responsibilities under the Commodity Futures Modernization Act of 2000, and the landmark Gramm-Leach-Bliley Act of 1999.

Finally, as you know, the Senate has passed, and the House continues to consider, legislation that would, among other things, grant the SEC the ability to match the pay and benefits of our sister regulators at the federal banking agencies, which we call "pay parity."

While SEC attorneys, economists, accountants, and examiners perform many of the same functions as the bank regulators and often work side-by-side with them, staff at the federal banking agencies received 24 to 39 percent more than their counterparts at the SEC. The pay disparity is a significant drain on morale and perpetuates the staffing crisis that is threatening to hamper the Agency's effectiveness.

The SEC, the Chairmen of our Congressional Oversight Committees, the securities industry, and the corporate community are all on record supporting pay parity. Pay parity is important for investors, for the securities industry and for our markets.

I continue to hope that this critical legislation will be passed in the near future. In the event that pay parity is enacted during this session, full funding for a new pay scale will be needed and would require additional appropriated funds beyond our current request.

Thank you for the opportunity to give this oral statement and appear here today. I will include my full statement in the record and be pleased to answer any questions.

[Prepared statement of Acting Chairman Unger follows:]

TESTIMONY OF

LAURA S. UNGER, ACTING CHAIRMAN
U.S. SECURITIES AND EXCHANGE COMMISSION

CONCERNING APPROPRIATIONS FOR FISCAL YEAR 2002

BEFORE THE SUBCOMMITTEE ON
COMMERCE, JUSTICE, STATE, AND THE JUDICIARY
COMMITTEE ON APPROPRIATIONS

UNITED STATES
HOUSE OF REPRESENTATIVES

May 22, 2001

U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

TESTIMONY OF
LAURA S. UNGER, ACTING CHAIRMAN
U.S. SECURITIES AND EXCHANGE COMMISSION

CONCERNING APPROPRIATIONS FOR FISCAL YEAR 2002

BEFORE THE SUBCOMMITTEE ON
COMMERCE, JUSTICE, STATE, AND THE JUDICIARY
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May 22, 2001

Chairman Wolf, Ranking Member Serrano, and Members of the Subcommittee:

I appreciate this opportunity to testify on behalf of the Securities and Exchange Commission ("SEC" or "Commission") in support of the SEC's fiscal 2002 budget. The SEC is a civil law enforcement agency. Since its creation in 1934, the Commission's mission has been to administer and enforce the federal securities laws in order to protect investors, and to maintain fair, honest, and efficient markets. We accomplish this mission by overseeing the markets through a public-private partnership. This system of shared regulation among the SEC, state regulators, self-regulatory organizations ("SROs"), and the securities industry enables the Commission to leverage its resources and is markedly different from the approach taken by other federal regulators. Even with this system, however, the SEC must stretch to keep pace with the rapidly changing marketplace.

The Commission today faces some of the most complex and difficult issues it has ever considered. No segment of American business has been more transformed by the rapid pace of technological innovation in recent years than the securities industry. New

technologies, new participants, and new financial products are reshaping our markets. Our markets also are becoming increasingly global – a trend that most expect to accelerate in the coming years. In addition, our national securities markets are taking steps to shed their long-held membership status and are moving to become publicly held entities. In short, it is now more important than ever that the SEC remain vigilant in policing and maintaining the integrity and transparency of our securities markets.

We are a nation of investors. Twenty years ago, only 5.7 percent of Americans owned mutual funds. Today, some 88 million shareholders, representing 51 percent of U.S. households, hold mutual funds. Our nation's investors have an unprecedented stake in our markets. Whether through college savings plans or retirement accounts, our collective stake in U.S. markets continues to grow, and we are increasingly dependent on the success and integrity of those markets. In addition, online trading and new technologies have empowered individual investors in ways that were previously unimaginable. It is against this backdrop that I intend to discuss the President's fiscal 2002 budget request for the SEC and the primary challenge we currently face: our inability to attract and retain staff.

The President's fiscal 2002 budget requests an appropriation of $437.9 million for the SEC, 3.6 percent more than our fiscal 2001 enacted level of $422.8 million. This $437.9 million request, while providing the resources necessary to meet the Commission's current needs, is a zero-growth budget. It only partially funds the Commission's inflationary and mandatory cost increases, does not provide any programmatic staffing increases, and actually requires the Commission to make a small reduction in its authorized staff level.

We intend to support the Administration and meet the challenges posed by this recommended budget by continuing to use our existing resources as efficiently and effectively as possible. Unfortunately, and perhaps ironically, we have the ability to operate at this funding level because of the severe staffing problems we currently face. In particular, our inability to pay staff at a level comparable with the other federal financial regulatory agencies has hampered our ability to attract and retain staff. The resulting high turnover that we have experienced has resulted in a significant efficiency loss and has left certain positions unfilled indefinitely. Because filling these positions has proven to be so difficult, we intend to fund some of our mandatory costs by making reductions in the number of vacancies that we will fill in fiscal 2002. However, constraining the SEC's growth and relying on cutting unfilled positions is not preferred and certainly is not sustainable over the long term.

The SEC will need significant additional resources in fiscal 2003 and beyond to respond to both the continuing innovations in our markets and the increasing regulatory responsibilities we face as a result of several recent legislative initiatives. In particular, we will require additional examination and oversight staff to meet our new responsibilities under the recently enacted Commodities Futures Modernization Act of 2000 ("CFMA"), which provides for joint oversight with the Commodities Futures Trading Commission of new security futures products, and the landmark Gramm-Leach-Bliley Act of 1999 ("GLBA").

In addition, the SEC critically needs to stay abreast of the rapid evolution of our securities markets. New markets and new trading models are constantly emerging. Electronic trading platforms – some of which didn't exist just a few years ago – are now

anonymously matching buyers and sellers of hundreds of millions of shares every day. In February of last year, the Commission approved the International Securities Exchange's application to become the first new national securities exchange in twenty-seven years. Now, four entities have applied for registration as an exchange. At the same time, the traditional exchange and over-the-counter markets continue to innovate. Both the New York Stock Exchange and Nasdaq are in the process of incorporating greater automation into their markets, launching complex and important initiatives such as NYSE Direct and the SuperMontage.

No less pressing is our need to keep up with the challenges presented by today's increasingly global marketplace. Companies throughout the world are now seeking capital on a cross-border basis. In addition, U.S. investors today can view real-time quotes from foreign markets, and electronic linkages reduce the costs to U.S. investors of trading directly in foreign markets. These developments make it increasingly important for the SEC to promote high quality disclosure and transparency standards, including high quality internationally acceptable accounting standards.

Despite these long-term needs, our fiscal 2002 request will allow the Commission to continue such important initiatives as:

- combating the rise in Internet and financial reporting fraud;
- overseeing the securities industry's automation changes in connection with the transition to a T+1 settlement system;
- maintaining our formal inspection cycle program for the increasing number of alternative trading systems;
- updating and improving prospectus requirements for variable insurance products;
- developing a tailored disclosure document for unit investment trusts; and

- addressing developments in domestic and international accounting and auditing matters.

Having outlined our ongoing priorities and how we intend to manage the funding level approved in the President's budget, I would now like to discuss the Commission's severe difficulties in attracting and retaining qualified staff.

Staffing Crisis

At present, the Commission is unable to pay our staff what our counterparts at the federal banking agencies pay their staff. Without the ability to pay more, the Commission's effectiveness is jeopardized by its inability to attract and retain dedicated professionals. None of the federal banking regulators is subject to the government-wide pay schedule. As a result, they are able to provide their staffs with appreciably more in compensation and benefits than we can. This disparity is a significant drain on morale. It is difficult to explain to SEC staff why they should not be paid at comparable levels, especially when they are conducting similar oversight, regulatory, and examination activities. It is one thing for staff to make salary comparisons with the private sector, but quite another for them to see their government counterparts making substantially more than they are.

This is particularly true in the wake of the landmark GLBA mentioned above. As this Subcommittee is well aware, the GLBA demands that the Commission undertake additional examinations and inspections of highly complex financial services firms both to fulfill our own oversight responsibilities and to provide the Federal Reserve and other banking agencies with the information and analyses needed to fulfill their missions. Moreover, by allowing securities firms, banks, and insurance companies to affiliate with one another, the GLBA requires increased coordination of activities among all the

financial regulators. Even more so than in the past, Commission staff are working side-by-side with their counterparts from the banking regulatory agencies, including the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. However, we cannot match the salaries that our sister regulators pay.

The Commission has already seen several staff leave to take positions with these agencies, primarily because of pay. Unless we are put on equal footing, this trend will continue and most likely intensify. Given the complexities of our markets and the new business affiliations we are likely to see, the SEC believes we should be working together from the same starting point.

Pay parity is good public policy. With approximately 3,000 staff, the SEC is small by federal agency standards. This staff is charged with overseeing an industry that includes about 700,000 registered representatives of approximately 8,000 broker-dealers, some 15,000 companies that file reports with us, about 30,000 investment company portfolios, and about 8,000 registered investment advisers. Over $41 trillion in stocks are expected to trade hands this year on the New York Stock Exchange and Nasdaq, including transactions on numerous new electronic communication networks. Mutual funds now hold over $7.4 trillion in assets. This exceeds by about $4 trillion the amount on deposit at commercial banks and surpasses by $2 trillion the total financial assets of commercial banks. Unlike bank deposits, however, mutual fund assets are uninsured and no SROs help us regulate this sector.

With such important responsibilities and at such a critical time in our markets' development, along with the possible advent of social security reform that may involve

many more individuals in our markets, the Commission simply cannot afford to suffer a serious staffing crisis. Since 1996, our attrition rate has been increasing, particularly among our more senior professionals. Over the last two fiscal years, the Commission has lost 30% of its attorneys, accountants, and examiners.[1] If this trend continues, the Commission's mission of protecting investors will be seriously threatened.[2]

In a world where first-year associates are making six-figure salaries in Washington, D.C. law firms, the salaries the SEC can provide are simply not competitive to recruit and retain a sufficient number of talented professionals to reduce high turnover and fill open positions. We recognize that the SEC cannot completely match the higher salaries offered in the private sector by brokerages, law firms, SROs, and other securities-

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1 Over the past several years the Commission has explored virtually every available approach to keeping staff longer. In 1992, we petitioned and received from the Office of Personnel Management ("OPM") the authority to pay the majority of our attorneys and accountants approximately 10 percent above their base pay. While special pay was a step in the right direction, its value erodes over time and it proved to be a short-term solution. This is because staff that receive special pay do not receive the government-wide locality increase each year, which means that their special pay becomes less valuable over time and hence becomes less effective as a retention tool. Our appropriation last year included funds to reinstate special pay rates for certain employees and OPM recently approved our proposed special pay rates for certain attorneys, accountants and examiners. While this should help, we know based on our experience this is at most a temporary and partial remedy to the SEC's staffing crisis. In addition, even with special pay, the salaries of the federal banking regulators are still substantially more than we can pay our staff.

2 Resolving the Commission's staffing crisis requires statutory changes to allow the agency to pay its employees outside of the government-wide pay scale, and it also requires Commission authorization and appropriation at a level that allows the agency to implement pay parity. Without the authorization to be appropriated additional funds for pay parity, having the authority alone will do little to address our staffing crisis. By our estimates, implementing pay parity with the banking regulators would require a net funding increase of approximately $70 million in fiscal 2002, with yearly adjustments for inflation thereafter. (This assumes full-funding of special pay and no new staff in fiscal 2002.)

related businesses. Something needs to be done, however, to close the pay gap and reduce the turnover problems we face. The most vital resource we have, ultimately, is our highly professional and well-regarded staff. This is the one area we can least afford to jeopardize.[3] With the full Senate passing S.143, the Competitive Market Supervision Act of 2001, and the House Financial Services Committee having voted to approve companion legislation in H.R. 1088, the Investor and Capital Markets Relief Act, I hope you can support us in providing the salary relief and resources the SEC truly needs.

In addition, S. 143 and H.R. 1088 include provisions to improve and address the long-term stability of the SEC's fee collection mechanism. Both bills significantly reduce fees for investors, market participants, and companies making filings with the Commission, while preserving the amount of offsetting collections available to this Committee to fund the agency in coming years[4]. These bills spread the cost of regulation more evenly among those who benefit from the activities of the Commission. The Commission supports both of them in their current forms and looks forward to having the agency's funding structure dealt with in a comprehensive and balanced manner.

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[3] A broad cross-section of the securities industry have expressed support for pay parity, including the Securities Industry Association, the Investment Company Institute, the Investment Counsel Association of America, the California Public Employees' Retirement System, the National Association of Securities Dealers, the New York Stock Exchange, Fidelity Investments, and the Business Roundtable.

[4] The Congressional Budget Office estimates that fees required to be collected by the SEC from all sources will total over $2.47 billion in fiscal 2001. This amount represents more than five times the SEC's enacted fiscal 2001 appropriation of $422.8 million. As stated, both S. 143 and H.R. 1088 are designed to reduce fees while maintaining the amount of offsetting collections that are available to the SEC's appropriators. In fiscal 2002, this amount is estimated at $1.15 billion.

Telecommuting

Finally, despite the lack of additional resources for telecommuting in our fiscal 2002 budget, I also would like to note the SEC's commitment to your telecommuting initiative. I believe the SEC is well situated to take advantage of the benefits and increased flexibility made available by telecommuting. With a large number of staff regularly conducting off-site inspections and examinations of investment advisers, SROs, and broker-dealers, telecommuting is the next logical step. Towards this end, the SEC is currently undertaking several information technology initiatives and pilots that are consistent with your efforts. My staff and I will provide additional background regarding our efforts in this area as we move closer toward full implementation.

Conclusion

Our nation's markets and the SEC are at a crossroads. New technologies and activities continue to pose new challenges and threats to the integrity of our markets, as does increased globalization. I appreciate the support that this Committee has provided the SEC in the past and look forward to having a fruitful dialogue regarding the resource needs and policy issues that currently face the Commission. I also appreciate the willingness this Committee has already shown in recognizing the need to resolve the SEC's intractable staffing problems. I hope we can work together and take the final step by enacting pay parity legislation for the Commission this session. The Commission looks forward to continuing to work with you.

STATUS OF PAY PARITY LEGISLATION

Mr. WOLF. Sure. Without objection, thank you very much.

On the pay parity and the staff issue, I support the legislation and if you can think of anything that we can do, I am hopeful that it will pass, although I did see the other day that OPM, I do not know if they opposed it or they—what did they actually say, OPM?

Ms. UNGER. The letter itself, which we did prepare a response to—and I would be happy to provide both for you if you want to include them in the record—indicated that the Commission had other options available to it that we could use to face the staffing crisis that we have described, and also expressed concerns about portability and about fragmentation.

Portability, I guess, is the ability for employees to leave one area of the government and move. Portability is our problem. And I think fragmentation refers to the entire Civil Service pay scale and the fact that you would have disparity among the agencies.

Mr. WOLF. Well, I support it. It has passed the Senate. What was the vote in the Senate?

Ms. UNGER. It was by unanimous consent.

FUNDING OF PAY PARITY

Mr. WOLF. It was by unanimous consent.

This is a fairly tight budget. You are asking for over 3 percent above last year, which is pretty much flat.

In anticipation of passage of pay parity legislation, if you do not have the appropriations, if you miss this train, of not being able to implement it at least until December, or potentially October or November of the year 2002.

So if the bill passed and were signed into law, how would you do it if you did not have any additional money?

Ms. UNGER. My understanding is that the House will take up the bill shortly after the recess.

Mr. WOLF. Okay.

Ms. UNGER. Our hope is that we could have it included. We have not had our appropriation hearing yet in the Senate. So certainly we would love to ask for it now. I do not know if you can actually appropriate money to us for something we do not have yet, and I think that is why the President's budget does not include the figure to implement pay parity.

Mr. WOLF. So if it passes and is signed by the President, then you will be coming up and asking?

Ms. UNGER. Yes.

Mr. WOLF. And the cost of that will be roughly again what?

Ms. UNGER. About $70.1 million.

Mr. WOLF. Per year?

Ms. UNGER. For the first year.

Mr. WOLF. First year. And what would the second year be?

Ms. UNGER. $78 million.

Mr. MCCONNELL. It depends on whether we get a staffing increase or if it just tracks normal and inflationary growth. But it would probably go up by a certain four or five percent a year, as do most salary and expense accounts.

SPECIAL PAY RATE

Mr. WOLF. I see you have 280 openings. In fiscal year 2001, the Committee funded a program increase of $15 million to institute what they call special pay rate, which was implemented.

Your FY 2002 request includes an additional $4 million to pay for the annualization costs.

How will this new rate affect the pay of SEC employees? And who is it targeted to? This one here that the Committee gave you $15 million?

Ms. UNGER. The $15 million was for the employees that received "SI," or Securities Industry, designation. It amounted to between three and 18 percent for the employees who were eligible to receive it. It applied to about half of the SEC employees in total.

Mr. WOLF. What would that mean. If I could just give you, let's say a GS–14 accountant with six years' experience, what would they have gotten? Do you know?

Ms. UNGER. I think I would have to defer that question to Jim.

Mr. WOLF. Roughly.

Mr. MCCONNELL. They would have gotten a fairly small percentage increase because——

Mr. WOLF. Do you know what it is in dollars?

Mr. MCCONNELL. $117,600 annually is what we are capped at for anybody. That is the highest they could have been paid.

Mr. WOLF. And they all bump up at that level?

Mr. MCCONNELL. They all bump up to the $117,600.

Ms. UNGER. So what is a GS–14, Step 6?

Mr. MCCONNELL. Well, it would normally be in the $90,000 range, but with the special pay, they are likely at the cap now.

Mr. WOLF. They would have hit the cap. And if there had not been a cap on it, what would it have been?

Mr. MCCONNELL. It probably would have gone up a total of about 18 percent.

IMPACT OF THE ECONOMY ON ATTRITION

Mr. WOLF. With the downturn of the economy, what impact do you see this having on your attrition?

Ms. UNGER. I think we would have to look at past indicators to predict the future in terms of the attrition rate. I would assume that it would continue because the disparity exists in the salaries between the SEC and the federal financial regulators and the SEC and private industry. Both of those entities is where we are losing our personnel to.

Mr. WOLF. As they leave, as they exit, unless they are retiring, do you ask them why they are going and where they are going?

LOSS OF STAFF TO OTHER FEDERAL AGENCIES

Ms. UNGER. Yes. But they do not always respond and the evidence that we have of where they have gone is really anecdotal.

Mr. WOLF. But you believe most are going to your sister agencies?

Ms. UNGER. I think a significant enough percentage is going to the other agencies, and we are very concerned about it. Even aside

from that, overall, the ability of the Agency to attract and retain talent is diminishing day-by-day.

And so this is a serious problem. When we look out there and see how much more the other financial regulators are paying, we say to ourselves: "Well, we at least need to be competitive in the government service."

ATTRITION RATE OF SEC VS. OTHER FEDERAL FINANCIAL AGENCIES

Mr. WOLF. Are they having a similar problem, or is their attrition rate very low because of that? People are leaving there and going to Wall Street or going to K Street.

Mr. MCCONNELL. The attrition rates are very low at the other regulatory agencies, they are below the government average.

The FDIC, for instance, does not have any vacancies posted. If you go to their website, you will not see a single vacancy. They have been downsizing, to put it fairly, but they have very low attrition rates.

Ms. UNGER. Whereas our attrition rate is 30 percent. Government-wide, it is 15 percent.

Mr. WOLF. How long has that been going on?

Ms. UNGER. I think I actually have a chart. I think since the 1980s.

Mr. MCCONNELL. Yes, we have been tracking these rates since the late eighties. We have had very high attrition. We obtained special pay in 1992 the first time. That helped a little bit for a short period of time, but within 18 months, the attrition rates were right back up there.

Mr. WOLF. So your attrition rate of 30 percent has not just been this year and last year during the boom,——

Mr. MCCONNELL. It has been a long-term problem.

Ms. UNGER. Yes.

Mr. WOLF. Ms. Roybal-Allard?

Ms. ROYBAL-ALLARD. Thank you, Mr. Chairman.

Welcome.

Ms. UNGER. Thank you.

FAIR DISCLOSURE RULE

Ms. ROYBAL-ALLARD. It is my understanding that there were record number of comments that were received about your Fair Disclosure Rule last year.

Critics say that the Fair Disclosure Rule has hurt both the quantity and the quality of information flowing from company to the market.

Do you agree or disagree with this? And are you considering a reexamination of this rule?

Ms. UNGER. We actually just had a reexamination of the rule. I conducted a roundtable in New York City about a month ago, and we invited members of the investment, investor analyst, and issuer communities to discuss Regulation FD. We wanted to find out exactly the answer to your question, which is what impact, if any, has it had on the quality and quantity of information. I think leaving that roundtable at the conclusion of that day most people would agree that it has affected the quality of information negatively.

However, there is more information available, just not the depth of information some people would like to see. There was a subsequent roundtable that was conducted by the National Investors Relations Institute and then the House Financial Services Committee held a hearing last week, where I testified.

So a lot of people are looking at the impact of this rule. We will issue a report in the next month on our findings and some recommendations, but I think at a minimum we would like to perhaps provide more guidance to the industry, so they can have greater comfort in terms of what can be disclosed, what should be disclosed, and what is material. That area seemed to be the biggest sticking point.

Ms. ROYBAL-ALLARD. As part of that report, will you also have guidelines to differentiate between the type of information that companies must disclose under this rule, as opposed to what really is not necessary?

Ms. UNGER. Well I think you have hit upon one of the critical issues associated with Regulation FD: what needs to be disclosed, what is material information under the rule. The rule is triggered by materiality. A company cannot disclose material non-public information to an analyst without disclosing it to the whole world at the same time.

So that has perhaps hampered some discussions with analysts or caused discussions to cease entirely. Then the questions are: if you want to disclose information to the world, because obviously you want people to know something about your company—then what can you disclose, what is the timing, what should you be concerned about, and what should you not be concerned about?

Ms. ROYBAL-ALLARD. And I am sorry, you said the report will come out next month?

Ms. UNGER. In the next month.

Ms. ROYBAL-ALLARD. In the next month, okay.

DISCLOSURE OF PROXY VOTING DECISION

There has also been controversy about the extent to which mutual fund companies should disclose their proxy voting decisions to shareholders. And some firms, as I understand it, do disclose and others do not. Could you please explain this issue a little bit more to the Committee? Does SEC keep track of these proxy voting practices by the mutual funds? And is this practice typically disclosed in a mutual fund prospectus?

Ms. UNGER. I do not know. I think we have someone here from our Division of Investment Management who might be able to answer the question in more depth. I do know that people are interested in how some of the large mutual funds vote on certain issues in terms of corporate governance and following what their beliefs are.

And it has become a more common practice for those funds to make available, or the large institutional investors in those funds to make available, their proxy voting record on the Internet. And so that has provided more transparency in terms at least of where the institutional investors' interests lie.

With respect to—what was the other part of the question?

Ms. ROYBAL-ALLARD. The mutual fund prospectus. Is this a practice, you know, that is typical?

Ms. UNGER. It is not.

Ms. ROYBAL-ALLARD. Should it be? I am just trying to understand the controversy more because there seems to be a real concern by some that sometimes there is what is at least perceived to be a conflict of interest, that people should, consumers should know, how people are voting through the proxy. So I am trying to understand just how serious an issue this is, and if it is something that the SEC should be looking at more closely and dealing with.

Ms. UNGER. Well, probably what they are talking about is that the large institutional investors are voting the proxies a certain way and obviously they stand for many individual investors. And it could be that the individual investors want more information about how their retirement funds are being managed and what the position is of the institutions managing those funds.

Of course the SEC is very much a disclosure-based agency, and we are great believers in transparency.

I have not heard a lot about what you are talking about recently, but I would be happy to look into that and provide you with more information on it.

Ms. ROYBAL-ALLARD. Okay. This is an article that came out in *The Washington Post.* And according to one person, they say that the real issue is when is management's interests different from the shareholders? So if you could provide me with some additional information.

Ms. UNGER. Were you reading—I am sorry—from a newspaper article?

Ms. ROYBAL-ALLARD. It is *The Washington Post,* April 8th of this year. And it says "Prodding for Disclosure of Fund's Proxy Votes."

Ms. UNGER. I would be happy to provide you a further response.

[The information follows:]

DISCLOSURE OF PROXY VOTING DECISIONS BY MUTUAL FUNDS

A mutual fund is typically managed by an investment adviser who makes the decisions as to how proxies of the fund's portfolio companies should be voted. A mutual fund's independent directors, in overseeing the activities of the fund's investment adviser, should ensure that a fund's proxy voting power is being exercised to benefit fund shareholders. Many funds have established written policies on proxy voting to provide guidance to fund advisers when they vote shares on important issues such as corporate governance, executive compensation plans, capital structure, and anti-takeover defenses.

Currently, mutual funds are not required to disclose their proxy voting decisions to their shareholders. Some funds choose to make their proxy voting decisions, as well as their guidelines on how they exercise their proxy votes, available on their websites or elsewhere. These funds consist primarily of "socially responsible" funds, which use social and moral criteria as well as financial criteria to select investments. Some other funds choose to make their proxy voting guidelines available, but do not report individual proxy voting decisions.

The Commission recently received rulemaking petitions from the AFL-CIO and the International Brotherhood of Teamsters asking that we require mutual funds to disclose guidelines they use in determining how to vote on proxy proposals, as well as the actual votes cast on proxy proposals. The Commission staff is considering these petitions.

The petitioners argue that providing fund shareholders access to proxy voting information could enable them to detect any proxy votes that may be tainted by the self-interest of the fund's investment adviser. As an example, the petitioners point to the situation where a fund adviser manages the retirement plan assets of a company whose stock is owned by the fund, and, as a result, may be inclined to support the company's management in order to preserve the adviser's business relationship with the company. The petitioners also argue that disclosure of a fund's policy on proxy voting decisions may give fund shareholders valuable insight into the fund's approach to corporate governance and value creation.

Those who oppose required disclosure of proxy voting argue that fund investors are not interested in this information. Fund managers also argue that disclosure of proxy voting decisions would undermine their ability to work with the management of companies in which they invest to change corporate policies that are the subject of proxy proposals.

Ms. ROYBAL-ALLARD. Okay. Thank you very much.
Ms. UNGER. Thank you.

TRADING AND REGULATION OF QQQ

Ms. ROYBAL-ALLARD. I understand in your opening comments or earlier that you mentioned the trading of cubes and how it has exploded in the last couple of years. Could you explain a little bit about what cubes are and why they have become so popular?

Ms. UNGER. Well, they track the Nasdaq top 100 stocks. I am not sure as to the reason for their popularity, other than it is a new index. There has been a keen interest in Nasdaq stocks generally, and indices are a more diversified way to invest. But it is an example of a new product. And the reason I included it in my oral statement was to illustrate how quickly the market is changing and how technology is becoming such a strong force in our marketplace.

Ms. ROYBAL-ALLARD. This trading of cubes then is having an impact on the market? And so my next question is, is SEC as a regulator looking at this to see if it is going to require any kind of regulation in the future?

Ms. UNGER. I do not think we have taken the position that it requires any new regulation.

Ms. ROYBAL-ALLARD. Just that they keep within existing regulations? I guess, again, this is an area that I am not familiar with, and I am trying to understand, based on articles and things that I have read, that this is something that has exploded in the last couple of years and that there is concern that it is going to have impact on the market. And I do not know whether that is good or bad.

Ms. UNGER. An index is usually not a negative product, or it would not have a negative impact on the market because it is a large representation of the market. So I would think it would not adversely impact the market.

What is interesting and notable about QQQs is that there is such a keen interest in them. We always find new products interesting, and the fact that it does track the Nasdaq stocks, of course, adds to that.

Ms. ROYBAL-ALLARD. So from your perspective, regardless of what we read in the newspaper at this point there is no reason to be concerned or alarmed by this explosion of cubes on the market?

Ms. UNGER. No.

Ms. ROYBAL-ALLARD. Is that what I am understanding?

DISGORGEMENT AND PENALTY RECOVERY RATE

Okay. Here is another article I am going to be referring to. It was printed earlier this year in *USA Today*. And what it did was it highlighted the low recovery rate of the SEC pertaining to the victims of fraud. Could you tell me what the recovery rate is and why it is so low? And what kind of message does this send to investors who are the victims of fraud or who may be, you know, thinking of getting to the market and maybe afraid because they know that if they are victims, chances are they are not going to have a chance of recovering anything?

Ms. UNGER. The Commission can collect two kinds of monies in the enforcement context, in effect, two buckets of monies. One is for

disgorgement, which is ill-gotten gains, and ideally that would go back to harmed investors. The other is for penalties, and that actually goes into the general revenue of Treasury.

The disgorgement, which is on behalf of investors, is something that we try very hard to collect obviously because it goes back to the people who were wronged by the fraudulent conduct.

For example, the Robert Brennan, First Jersey Securities Case, we sought a $75 million judgment and then he entered into bankruptcy proceedings in order to avoid that judgment when we ultimately prevailed against him. And I know there were some very dedicated staff devoting most of their life to getting that judgment satisfied. So we do think it is critical. We do whatever we can. We have some full-time staff devoted solely to collection practices. I do not know if I should say this, but in New York, it was called "The Terminator."

So we do take it very seriously. But there is only so much we can do. And we have tried to be creative over the years. When I first came to the Commission, I conducted a top-to-bottom review of the Enforcement Division. And one of the things that we all sat and grappled with, this committee that I had assembled, was how can we have a better performance rate on collecting this disgorgements and penalties?

We are working with Treasury also because any amount that is not disgorged is something that could be counted as income to the person who did not disgorge the ill-gotten gains. Therefore they would receive a 1099 and be taxed on that money. So that is one way to encourage payment. And we have done that. That is one way we can provide an incentive to paying the penalty and/or disgorgement that you owe.

Ms. ROYBAL-ALLARD. Is there anything that this Committee or Members of Congress in general can do to help you to improve your recovery rate?

Ms. UNGER. I did not come up with any ideas during that enforcement review, but I would be happy to take another look at it and talk to the Director of the Division of Enforcement and see if there is anything that they need and get back to you on that, too.

[The information follows:]

DISGORGEMENT AND PENALTY RECOVERY

Chairman Unger and the Division of Enforcement reviewed its program for collecting disgorgements and penalties as part of her Enforcement review. At this time, we cannot identify a specific need that we believe would merit Congressional action. We very much appreciate the Subcommittee's support for our enforcement efforts, and we will certainly attempt to keep it apprised should such a need arise in the future.

Ms. ROYBAL-ALLARD. Thank you very much. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Serrano? And if you would like to have a statement, we said we were going to leave it open if you wanted to make it.

THE DIGITAL DIVIDE

Mr. SERRANO. Thank you, Mr. Chairman. I will not have an opening statement. I just want to apologize to you and to Chairman

Unger for being late. I had an emergency meeting that I had to attend.

Interestingly enough, it was related to an issue from this morning's hearing, the FCC. I should have had it during that time. But I apologize for that.

Let me discuss with you if I may the issue of the ever-growing digital divide. I am keenly interested in digital divide issues. That is, ensuring that the promise of modern information technology is as much a reality in disadvantaged and under-served communities as it is in the wealthiest ones.

To the extent that Internet research and trading are growing, do we risk having a class of investment have-nots forced to rely on slower processes involving paper information and middle-men rather than the speed of the Net?

If so, what should be done about it? And who should be doing it?

Ms. UNGER. I think you have hit on what I consider to be one of the biggest regulatory challenges facing the Commission today. That is, how do you take the benefits of technology, which provides large quantities of information and the ability to disseminate and provide information to people at a very low cost very efficiently, without in some way hampering the ability of those people who do not have access to computers to also obtain that information?

And so all of our regulations moving forward consider that. The statistics I have heard are that, as I said earlier, about 51 percent of U.S. households are investors, and about 50 percent of households have computers.

I would love to know if it was the same 50 percent or not. And I did actually put on the Internet an investor survey or questionnaire—the first ever I think by the SEC—to obtain more information about individuals and what they consult in making their investment decisions, the extent to which they use the Internet, and how we can be more helpful.

The Commission has attempted to really reach out and educate individuals who do use the Internet, but not at the risk of not providing that same information to off-line investors.

So we struggle with that every day, and that is harnessing the benefits of the Internet without hampering our overall disclosure regime to those who do not have access to it.

SHARING INFORMATION BETWEEN AGENCIES

Mr. SERRANO. But do you have access to information, or do you share information from other agencies who have perhaps a clearer picture as to haves and have-nots in this technology age in order for you then to see where you need to go?

For instance, the Commerce Department seems to be doing quite a bit on the issue of trying to bridge this gap. They may have more information as to what is happening in the society. The Education Department may know.

How do we tie in? Or are you trying to figure this out by yourselves without that information?

Ms. UNGER. I think I would be happy to avail myself of any information that is available about the use of the Internet with respect to investors.

Moving forward though, we need to be mindful of the fact that the world is changing and more people are using the Internet to research investments if not to actually place orders.

The statistic I have seen is that about 84 percent of investors use the Internet to research, and yet on-line investors account for about 20 percent of the trades executed or placed.

So obviously more people are using the Internet to research than to actually place their orders. The question is: How do we take that statistic and make it meaningful in our regulatory regime?

Some of our more recent rules have been prompted by technology, yet each and every rule that we do adopt takes into account technology and how it changes regulation and investors' behavior.

Mr. SERRANO. I would encourage you to have the Commission become even more involved in this area than you may be. Because you are the ones that can actually give us the information as to whether we are creating a bigger gap.

I mean, the fact of life is that there is now with this new economy a larger number of people in near-poor communities, or communities that are not affluent, with the ability to do a little investing, or maybe a lot of investing.

Nothing will really happen unless they get the assistance they need to accomplish this. So you may be the ones really who have the ability to tell the country where we are going wrong in that area. So I would hope that you really stay on top of it and expand the analysis that you are doing.

Ms. UNGER. One thing that complicates it a little bit, and the beauty of the Internet, is that, even if you cannot afford a computer, you can access a computer at the library, or a Cyber Cafe, or something like that. So it will be hard for us to know precisely those who do not actually have computers at home but actually have the ability to use the computer to conduct their research or to find out information or avail themselves of our education tools.

But I agree with you, it is something I would like to know more about.

AFFINITY FRAUD

Mr. SERRANO. Okay. Let me move on to another issue here.

A recent *New York Times* article described the growing problem of investment fraud against immigrants, often by brokers of the same ethnicity or nationality, now called "affinity fraud."

Would you describe the problem and what the SEC is doing about it? Beyond enforcement against brokers and firms that defraud immigrant clients, is there anything the SEC can do to prevent fraud such as advertising in foreign language publications?

Ms. UNGER. We see affinity fraud not just against differing ethnic groups but against different age groups. For example, the elderly are very much a victim of affinity fraud. So it is something that concerns the Commission a great deal.

We like to send strong messages with our enforcement cases. In the cases I have seen so far involving affinity fraud, we generally conduct a sweep so we can bring a large number of cases simultaneously and really send the message out there strongly, and also have the ability to then use that number of cases, or the sweep, to educate people about these types of frauds and to make them

more circumspect about how they examine different investment opportunities.

I think we could probably never make that point enough times and in enough different places. And that is, to know your broker, ask the appropriate questions. As Chairman Levitt used to say, people spend more time, I think, selecting paper towels than actually picking a broker. So it is something that we cannot spend enough time and resources doing, yet we do reach out to the greatest extent possible.

So we do it both through enforcement and through education.

Mr. SERRANO. Could you——

Ms. UNGER. I am receiving a note over here that we also have investor education materials, as I just said, on the web site in both English and Spanish.

Mr. SERRANO. Okay. Can you give us some examples, though? In general we know that it is brokers from a group trying to convince members of that group to invest and defrauding them, and you said age is also a "group", but these are obviously people who are licensed and everything that are misbehaving.

How do they reach these folks?

Do they advertise to them in certain places?

Do they reach them at seminars?

How are these folks reached?

Ms. UNGER. Generally the way the affinity frauds operate is that the fraudster or broker finds a hook, if you will, that would appeal to a certain group of potential investors.

One thing that we have seen recently that is a perfect example—I would not exactly call it affinity fraud—of the same idea of going out and appealing to some type of interest. That is, people who have lost money in the market.

The appeal is: Have you lost money in the market? Win it back, double or nothing. No-risk investment. Earn high rates of return. Recover all those losses you have experienced in the last six months. Or something to that effect. So that is a way that a broker can go out and reach a huge universe of investors who are all worried about the same thing.

Another, more classic affinity fraud, is to reach out to one community in some way through a group, through a church, a club, or something like that, where all the members are bonded by some common heretage interest, and the fraudster reaches out to all those members and offers something that would appeal to them based on their common membership charteristics or some other commonality. So the idea is to find a common interest, and then reach all those people simultaneously.

Mr. SERRANO. Okay, Mr. Chairman, I am sure I have some more questions in here but I have to kind of put my thoughts together, so I will gladly give up the mike.

EFFORTS TO COMBAT INTERNET FRAUD

Mr. WOLF. Congress increased the funding for the SEC by almost $100 million over the last two years, an average of over 15 percent.

One of the primary justifications for the increases was to give the SEC the staff and the tools necessary to combat Internet securities fraud.

What has the SEC done to build on this capability?

Ms. UNGER. In 1998 the number of Internet cases we brought was about 4 percent of our total cases. For Fiscal Year 2000, Internet fraud was about 16 percent of our total cases.

So we have used that money to create 75 new positions, most of which have been allocated towards the Office of Internet Enforcement, which is part of the Enforcement Division. We have used it to fund, or to direct resources towards enforcement actions, for Internet surveillance, for Internet surveillance training, and also for our Enforcement Complaint Center, where we receive about 300 complaints a day.

Mr. WOLF. So since the number of enforcements have grown, is it because fraud is growing? Or is it because you now have the staff to deal with it and find it?

Ms. UNGER. Probably a little bit of both. So far, year to date, we have brought 220 actions involving 760 persons and entities. So I do believe it is the resources that have enabled us to increase the percentage, as I said, from 4 percent to 16 percent. So that is a roughly four times increase in the number of cases involving Internet fraud.

Mr. WOLF. Of course in 1998 the Internet was not what it is today. And so I just wondered——

Ms. UNGER. That was right about the beginning of it. I conducted a retail on-line investor survey, I started in the summer of 1998. At that time, about 30 percent of trades were executed on-line or placed on-line. So it is actually a higher percentage than we are seeing today.

Mr. WOLF. Really? A higher percentage in 1998 than we are seeing today?

Ms. UNGER. A higher percentage of trades overall, yes.

THE IMPACT OF CYBERSMEAR

Mr. WOLF. A recent SEC case demonstrates the dramatic impact that one individual can have on securities markets through postings on the Internet.

You filed a complaint against an individual who allegedly posted a false message about a particular company on a Yahoo Message Board that caused the company's market capitalization to drop by over $200 million.

Could you explain a little bit about this case?

Ms. UNGER. Is that the Emulex case?

Mr. WOLF. Sean E. St. Heart. "On March 29th the Commission filed a complaint in the United States District Court for the District of Columbia alleging that Sean E. St. Heart, age 25, engaged in illegal cybersmear by posting a false message about NCO group on the Yahoo Finance Internet page. St. Heart's message had a dramatic impact on NCO's stock price causing its market capitalization to drop by over $200 million."

Ms. UNGER. Does it say what the name of the case was?

Mr. WOLF. "SEC Sues St. Heart." "The Commission's complaint specifically alleges that on a Friday night, December 3, 1999, St. Heart posted a false message on Yahoo in which he claimed that he as president and CEO of St. Heart Productions, together with 12 of the companies, prepared a $20 million lawsuit against NCO

for its business practices. The message"—and then it goes on. SEC versus Sean Edward St. Heart.

Ms. UNGER. I cannot talk about a specific case, but I can say generally—and I do not know whether we have completed that case or not——

Mr. WOLF. I think it has. It is over. "St. Heart further consented to the entry of judgment. That waives the imposition of monetary penalty."

Ms. UNGER. We have brought a number of cases like this. I can think of three or four cases off the top of my head. I have someone here that can talk more specifically about that case, but what happens——

Mr. WOLF. Well I guess the real question is what happens? The penalty is cease and desist? Sean goes away. The company just gets devastated. How do you resolve that?

Ms. UNGER. Do you want to hear more about that particular case?

Mr. WOLF. Well, no, not that case. But in a case like that, cease and desist and that is it? It goes away? But the company has been hurt for a long period of time.

Ms. UNGER. In some cases the price of the stock actually comes back after the hoax is uncovered and people realize that it was not true or real information that was on the website.

However, if there are buying and selling in that period where there is false information out there, obviously investors are harmed. That is where the disgorgement figures come in for whatever happens during that time period.

In the cases we have brought, generally, the hoax has been uncovered within a matter of hours. I cannot think of a case where really it has stayed up for a long period of time, something like what you are describing. Again I can have someone speak more specifically to it.

But to the extent that investors are harmed, then we do try to provide a disgorgement pool of money for those investors.

INFORMATION SYSTEMS INITIATIVES

Mr. WOLF. In Fiscal Year 2001, the Congress provided a program increase of $10 million for the development upgrade of the SEC's Information System.

That base increase is again continued in the Fiscal Year 2002 request level. To justify the increase, Chairman Levitt talked last year about the need to develop electronic forms to improve document and records management and to better utilize market data and analysis tools.

How are you using the $10 million provided in the current year for information systems?

And do any of these initiatives constitute a one-time cost? And what is the top priority information system needs looking ahead to the next year?

Ms. UNGER. I will let Jim McConnell answer this question more fully, but we have used the technology to supplement our staff resources.

When the technology can do it better, faster, and more efficiently, then we try to implement technology to accomplish that.

One place that I can point to is the web crawler that we have now included as part of our enforcement efforts. The web crawler that will go and search not private conversations but public conversations on web sites and elsewhere looking for certain key terms to help us see whether or not there is fraud going on on the Internet.

Mr. WOLF. Is that a self-search, like you put key phrases in and——

Ms. UNGER. Yes. Yes. And I think maybe I will let Jim answer the question more fully.

Mr. MCCONNELL. Another area where we are prioritizing our information technology budget is in the examination program where we want to have modules that people can use in an interactive way so that paperless forms populate a database and then we can examine against that database when we go into brokerdealers and investment advisors.

We are also extending paperless filings beyond EDGAR to broker dealers, and investment advisors, so that we have an easier way to examine and know about our regulated population.

It is an ongoing cost. Most of it is continuing.

Mr. WOLF. Looking at how fast things are changing, is there anything out there that you ought to have that you do not have? I mean we have changed——

Ms. UNGER. Besides pay parity?

RAPIDLY CHANGING TECHNOLOGY OF INFORMATION SYSTEMS

Mr. WOLF. Well, besides pay parity. We have changed the computers in my office a number of times. We are constantly changing. I mean we just cannot keep up. The latest technology comes out two years, three years later and we are moving.

Ms. UNGER. We have updated recently to Microsoft Outlook Program.

Mr. MCCONNELL. We have a continuing program of modernization, both the software and hardware. That is exactly what we are finding throughout the industry. It is every two years now, it seems like, that you need to upgrade.

That is why the base is constantly increasing. You really do not find one-time increases usually in information technology these days. It is just a continuous program.

We are expanding greatly the use of laptop computers in our examination program. They have a usable life of 18 months sometimes.

Mr. WOLF. Do all your employees have laptops?

Mr. MCCONNELL. All of our examination staff have laptops. And then we have a lot of laptops we share. We have pools, and if people need them for special assignments, even for telecommuting, they can take them and use them in those situations.

TELECOMMUTING

Mr. WOLF. How are you doing on telecommuting? As you know now it is the law that 25 percent be telecommuting by the end of the year.

How are you doing with regard to that?

Ms. UNGER. That is actually part of our ongoing negotiations with the National Treasury Employees Union, and I expect we will have more information to you on what the proposal will include.

Mr. MCCONNELL. We have a telecommuting policy in place now. We intend to expand it dramatically. Currently we have about 100 people telecommuting.

Mr. WOLF. Out of a total of how many employees?

Mr. MCCONNELL. About 3,000. So we have a ways to go, and we intend to do it.

Mr. WOLF. You have a ways to go.

Mr. MCCONNELL. Technology is a big part of that. We have only recently been able to, in a secure way, have e-mail access from the home. We intend by the end of the year to actually have work station access from home. So we intend to move ahead on this aggressively, but it is part of our initial contract negotiation with the Union as well.

Mr. WOLF. We had a company come by yesterday saying that they have the technology using copper wire that, with your laptop or with your desktop, teleconferencing, that you can actually get on with one of your employees who were out in Fairfax or Rockville and verbally talk to them and exchange files through that.

Ms. UNGER. We definitely do not have that.

Mr. MCCONNELL. We do not have that. Security is something that really drives us a lot. I mean we are very concerned about it. Because we have secure data——

Mr. WOLF. Sure.

Mr. MCCONNELL [continuing]. Throughout our web. We will be able to by the end of this fiscal year have from home, or from a remote access, the ability to go into our internal network, work on projects, work on files, in a secure environment. We are not videoconferencing yet. We have videoconferencing, you know, among our regional offices and headquarters, but not to homes yet.

LEASE RENEWAL FOR SEC HEADQUARTERS

Mr. WOLF. You might want to look into that. It is quite impressive. They actually have a demonstration downtown. I am going to have a staff member go down. With the existing laptop that you have, they maintain that you can visualize and see and transfer documents.

Your Commission headquarters lease extension will expire in the year 2003. What is the status of the efforts to procure a new headquarters?

You have one building that is on Constitution Avenue? You are still there?

Mr. MCCONNELL. Our headquarters is on 5th Street.

Mr. WOLF. Fifth Street. And then he said you have one in Virginia, or two in Virginia?

Mr. MCCONNELL. We actually have two locations in Virginia.

Mr. WOLF. Where? Where are they?

Mr. MCCONNELL. They are in Alexandria, Edsall Road area.

Mr. WOLF. So are you going to, when this lease ends, the purpose would be to consolidate? Or will you extend, or what?

Ms. UNGER. Well we actually have a second space in Washington——

Mr. MCCONNELL. Right.

Ms. UNGER [continuing]. Also on G Street. So we will consolidate the two Washington locations, but keep the auxiliary or the additional space in Virginia. We have a lot of technology located there.

Mr. MCCONNELL. Right.

Mr. WOLF. We have a vote. Maybe we can—we may have to recess. I thought maybe Mr. Serrano could stay, but after two votes it just almost will not make any sense.

You have no more questions?

Mr. SERRANO. No.

Mr. WOLF. Well then in the interests of time, I have a lot of other questions but let me just submit them for the record and just raise one or two with you to get them on the record.

ELECTRONIC FILING FOR FOREIGN FIRMS

Mr. WOLF. In your letter to me dated May 8 you describe several new disclosure initiatives concerning foreign firms that are being undertaken by the SEC.

First, as I understand it, the SEC will now require electronic filing of all foreign companies. Can you explain to me how this new requirement is different from the past practices of the SEC? And what is the significance of this new requirement as it pertains to informing investors of human rights implications and the activities of foreign companies?

Ms. UNGER. All U.S.-registered public companies right now have to file their disclosure documents on EDGAR, which is our electronic system, Electronic Data Gathering and Analysis and Retrieval System.

We do not require foreign companies to comply with that requirement to date. We will now engage in a rulemaking to require foreign companies to also file their disclosure documents on EDGAR which will enable us or others using and accessing that database and which is available to the public, to enter searches and to find out more information about foreign companies more easily than they could do today.

Mr. WOLF. The second initiative is that the SEC will attempt to review all registration statements filed by foreign companies that reflect material business dealings with governments of countries subject to U.S. economic sanctions administered by the Treasury Department's Office of Foreign Assets Control, OFAC.

How has this changed the Commission's handling of the registration statement of a foreign company doing business for example with the Government of Sudan?

Ms. UNGER. Right now the Commission, because of our limited resources, selectively reviews registration statements. We do not review each and every registration statement submitted for filing.

As a result of our letter to you, we will now review all of the filings that you just described with material business dealings in for example the Sudan.

INTERAGENCY CAPITAL MARKETS WORKING GROUP

Mr. WOLF. You also referenced in your letter the SEC's support for an Interagency Capital Markets Working Group which could review those foreign registrants which raised egregious national secu-

rity or human rights or religious freedom concerns that exceed the SEC's expertise or capabilities.

Many Members I know would support such an interagency group and believe that it should go beyond Sudan to encompass countries such as China where there are 14 Catholic Priests in jail, and 150 Protestant pastors, and several hundred Buddhist monks, and Buddhist nuns, and hundreds of Muslims.

Can you explain in greater detail how such an interagency group might work if it were set up? Would the group be able to deny access to those firms deemed to be proliferators or in violation of any national security issues?

Ms. UNGER. Well the SEC does not have any authority to deny access to our capital markets at this point. However, if we were to share information with an interagency group such as the one we described in the letter to you, we can certainly pass on information about companies who are coming to the U.S. to raise capital. And perhaps there are more appropriate agencies that could take a different kind of action than the SEC.

SEC CHAIRMAN-DESIGNATE AND DISCLOSURE MEASURES

Mr. WOLF. This is the last issue, just to get it on the record. I want to cover it in case anybody is listening, or Mr. Pitt has anyone here.

Do you have any indication of the SEC Chairman-designate Pitt's views on these new disclosure measures?

Ms. UNGER. I do not, and I have not had a conversation with him about this particular issue. At the time that he is actually formally nominated, I intend to have a conversation with him about this letter and about the issues that you have raised with the agency with respect to foreign investments.

Mr. WOLF. And lastly, it is not a question. It is a statement, or a request, if you would.

If you ever come across—obviously you have a certain responsibility and you cannot be the watchdog here, but hopefully we can do our job here—but if you come across any effort by others in the Administration to dilute or roll back these new SEC initiatives, would someone call me and inform me of where the resistance or opposition is coming from?

Because the President has spoken very eloquently on the issue of human rights and religious freedom. The fact is he has given now four references to these issues since he has been President. The last one was to a major Jewish group two weeks ago, two-and-a-half weeks ago, here in Washington, D.C. He spoke of all these issues.

He has also referenced the issue of the Sudan I think three different times.

The International Commission on Religious Freedom, has also spoken very forcefully on this, Elliot Abrams, and Rabbi Sapperstein.

Secretary Powell, Secretary of State, has also been very eloquent when he has spoken out on these issues. Frankly, there has been no one in the Administration or in Congress who has not been very good when they speak out on these issues.

So I worry about some assistant secretary of state or some deputy assistant secretary for whatever in the Treasury Department, or some guy who may have come out of industry and thinks they just might try to reverse this, so if you hear of anything, if you could let the Committee know, or let me know, I would appreciate it.

Because you did the appropriate thing. And I think it is completely within the values and the ethics of both political parties in this country, and the President of the United States, and the Congress who has a very good bipartisan record on these issues, so if you do hear, if you could let us know.

And when Mr. Pitt feels comfortable, I would like to have an opportunity just to sit down with him.

We will just submit other questions for the record, in the interests of saving time. Do you have anything?

CONCLUSION

Ms. ROYBAL-ALLARD. No, Mr. Chairman.

Mr. WOLF. We will just submit the rest for the record and the hearing is adjourned.

Ms. UNGER. Thank you, very much.

Questions for the Record
Securities and Exchange Commission

Chairman Frank Wolf

Question 1:
In your letter to me dated May 8, 2001, you describe several new disclosure initiatives concerning foreign firms that are to be undertaken by the SEC. First, as I understand it, the SEC will now require electronic filing of all foreign companies. Can you explain to me how this new requirement is different from the past practice of the SEC? What is the significance of this new requirement as it pertains to informing investors of human rights implications of the activities of foreign companies?

Response:
At present, U.S. companies that register with the SEC are required to file electronically with the SEC their registration statements, prospectuses, periodic reports and other disclosure materials. Foreign issuers that register with the SEC, however, are not required to file these materials electronically but may voluntarily do so. Registered foreign issuers that choose not to file electronically file their materials with the SEC in paper format. These paper filings are publicly available for a fee through our public reference room and through third party service providers.

As discussed in the letter dated May 8, 2001, Acting Chairman Unger has asked the staff to prepare promptly for the Commission a proposed rulemaking to require foreign companies to file electronically on the Commission's EDGAR system. If this proposal is adopted, foreign issuer filings would then be available through our website without cost to investors to the same extent that the filings of U.S. issuers are available. As a result, investors would have easier access to all information contained in foreign issuer filings.

Question 2:
The second new initiative is that the SEC will attempt to review all registration statements filed by foreign companies that reflect material business dealings with governments of countries subject to US economic sanctions administered by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury. How does this change the Commission's handling of the registration statement of a foreign company doing business, for example, with the Government of Sudan?

Response:
The Commission's Division of Corporation Finance selectively reviews registration statements filed by companies that are undertaking U.S. public offerings of securities. The Division selects which registration statements its staff reviews with the goal of enhancing the disclosure provided to investors. The Division's staff considers many quantitative and qualitative factors in deciding whether to select a registration statement for review. These factors can include, for example, how the company's financial performance compares with its industry peer group, recent public statements by the company with respect to extraordinary items, and litigation involving the company. The Division's staff evaluates these factors from time to time to consider new issues that may be material to investors. A factor the staff will now consider is whether a foreign company discloses that it has material business operations in, or with, a country that is off-limits to U.S. companies.

Question 3:
The third initiative is that the Division of Corporation Finance at the SEC will seek information from registrants about material business in, or with countries, governments or entities with which US companies would be prohibited from doing business under economic sanctions administered by OFAC. In your letter to me you state that the SEC's aim "...is to make available to investors additional information about situations in which the material proceeds of an offering could – however indirectly – benefit countries, governments, or entities that, as a matter of US foreign policy, are off-limits to US companies." If a US citizen is considering an investment in a foreign company, and if that company's activities in some way benefit the Government of Sudan, how will that information be conveyed to the US investor? How is this new requirement different from the past practice of the SEC?

Response:
Foreign issuers file a prospectus with the Commission when conducting a registered public offering of securities. In addition, foreign issuers file publicly available annual reports with the Commission on form 20-F. These are the principal documents used to convey information to investors.

As noted in our earlier letter, if a registered company does material business in a country that is off-limits to U.S. companies and this business will have a material impact on the financial return from an investment in the company's securities, these matters are likely be significant to a reasonable investor's decision about whether to invest in that company. When a company has material business operations in such a country, our review process will seek to address whether such operations in that country, and any material risks relating to such operations, are adequately disclosed. Also, when a company is registering securities in connection with a U.S. public offering and the company discloses that it has material business in such a country, we will seek information with respect to whether material proceeds will benefit that country. This disclosure practice reflects our better understanding of the potential material impact of doing business in an off-limits country.

Question 4:
You also reference in your letter the SEC's support for an interagency capital markets working group which could review those foreign registrants which raise egregious national security, human rights, or religious freedom concerns that exceed the SEC's expertise and/or capabilities. I support such an interagency group and believe that it should go beyond Sudan to encompass all countries under US sanctions regimes, as well as China and Russia. Can you explain in greater detail how such an interagency group might work? Would this group be able to deny access to those firms deemed to be proliferators or other serious national security violators, or would it review registrants and offer its recommendations to the President?

Response:
The SEC would participate in a working group on Sudan, should such a group be formed, and provide appropriate information and assistance. Because such a group has not been formed, it is unclear what mandate and authority it may have.

Question 5:
In the case of PetroChina, a "carve-out" funding vehicle was created virtually overnight to circumvent Sudan- and national security-related opposition to the fundraising efforts of China National Petroleum Company. How will these new SEC disclosure measures help discourage this type of funding tactic by overseas companies seeking to gain access to US markets without facing SEC scrutiny?

Response:
In our earlier letter, we noted that, as a general matter, our existing disclosure requirements focus on the consolidated operations of the company that is registering securities, as well as the subsidiaries and affiliated companies it controls. The registrant is required to identify any parent company and other major shareholders and to explain their control relationship with the registrant. This type of disclosure is appropriate because the economic return on an investment is, generally, derived from the registrant's operations, not from the operations of the registrant's parent company or those companies under common control. Consequently, extensive information about parent companies and companies under common control with the registrant is generally not material and might be misleading to investors.

Companies and underwriters consider a number of factors in determining how to structure a particular transaction. These factors often relate to financial, legal, accounting, or business matters. As a result, we have no ability to assess whether our disclosure requirements will encourage or discourage the type of structure discussed in Question 5.

Question 6:
The web of affiliates. subsidiaries. parent companies and government connections maintained by foreign firms makes it difficult for the SEC and US policy-makers to protect investors and our national interests. American investors need to know the true identity and overseas involvements of foreign registrants as they relate to US-sanctioned countries. Although the SEC requires disclosure with respect to principal ownership structures and "material" subsidiary operations, could the SEC. for example. require foreign applicants to list prominently all those companies in which they own at least a 10% stake and/or who own at least a 10% stake in them?

Response:
Existing SEC rules generally require such disclosure. A foreign company registering securities with the SEC is required to disclose the identity of any person or entity that beneficially owns five percent or more of each class of the company's voting securities, unless the company is required to disclose a lesser percentage in its home jurisdiction, in which case the lesser percentage applies. This requirement can be found under Item 7 of Form 20-F.

A foreign company registering securities with the SEC is required to include as a publicly available exhibit to its registration statement a list of all of its subsidiaries. their jurisdictions of incorporation and the names under which they do business. A company may omit the names of subsidiaries that. in the aggregate. would not be a "significant subsidiary" as defined under Regulation S-X. This definition generally applies a 10% test with respect to the company's investment in the subsidiary, the company's proportionate share in the assets of the subsidiary, or the company's equity in the pre-tax income of the subsidiary. This requirement can be found in paragraph 8 of the Instructions as to Exhibits of Form 20-F.

Companies often use a prospectus summary. which appears in the first pages of many prospectuses. to highlight certain information. Our rules require that the prospectus summary be a brief overview of the key aspects of an offering. Companies are directed to consider carefully and identify those aspects of the offering that are the most significant and to determine how best to highlight those points in clear. concise language. Whether a particular shareholder or subsidiary is identified in a prospectus summary depends on the specific facts and circumstances relating to the company, shareholder or subsidiary.

Congressman Jose Serrano

STAFF COVERED BY PAY PARITY

Question 1:
I understand that the "pay parity" proposal covers not only attorneys, accountants and examiners, but all positions on the Commission staff. How does the high turnover rate among attorneys, accountants and examiners compare to the overall turnover rate for the agency?

Response:
The SEC's overall turnover rate was 13.8% in fiscal 2000 – double the government-wide rate of 6.8%. This overall rate compares to 17.5% for attorneys, 13.8% for accountants, and 13.9% for securities compliance examiners. The comparison of turnover rates in the various occupations during the last five years is as follows.

SEC AND GOVERNMENT-WIDE TURNOVER RATES

	Permanent Employees	Attorneys	Accountants	Securities Compliance Examiners
SEC				
Fiscal 1996	9.52%	11.32%	8.96%	10.31%
Fiscal 1997	11.94%	16.01%	12.13%	10.78%
Fiscal 1998	12.46%	15.19%	12.87%	10.48%
Fiscal 1999	13.72%	13.50%	13.72%	14.92%
Fiscal 2000	13.83%	17.47%	13.76%	13.93%

	Permanent Employees	Attorneys	Accountants	Financial Institution Examiners*
GOVERNMENT-WIDE				
Fiscal 1996	7.03%	6.66%	6.61%	13.77%
Fiscal 1997	7.62%	7.41%	7.14%	8.05%
Fiscal 1998	7.07%	7.05%	8.01%	5.56%
Fiscal 1999	7.08%	6.78%	6.62%	5.58%
Fiscal 2000	6.82%	8.18%	7.68%	6.12%

* The SEC is the only government agency that uses Securities Compliance Examiners. Financial Institution Examiners in other agencies perform similar work to Securities Compliance Examiners.

Question 2:
What would be the impact of granting "pay parity" to only the job classifications with the highest turnover?

Response:
All of our employees are necessary for the effective functioning of the agency and, as discussed above, the SEC has experienced higher than average turnover rates in more than a few, select occupations. Since Congress passed the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) in 1989, the federal banking agencies have been exempt from Title 5 across the board, allowing them to create their own higher pay scales for all of their employees. Therefore, in our view, allowing the SEC to match the compensation and benefits offered by the banking agencies for only SEC staff in certain occupations would not be true "pay parity." Dividing the agency in this fashion could also be harmful to the morale of those who do not receive an increase.

Congresswoman Lucille Roybal-Allard

TRADING OF "CUBES" (QQQ)

Some analysts believe that trading of Cubes may have been a factor in the market's volatility and decline over the past year. They draw parallels to the major role that trading of S&P futures contracts may have played in the crash of 1987.

Some analysts also contend that securities rules that prohibit traders from short-selling a falling stock do not apply to Cubes. When the price of Cubes fall sharply, traders can make money by quickly selling the underlying stocks which, in turn, can push Cubes down further in a dangerous cycle.

Question 1:
Does the SEC agree with such an analysis? Are the trading of Cubes exaggerating trends in the market and leading to increased volatility? Are Cubes subject to prohibitions on short-selling a falling stock?

Response:
While there have been several periods of relatively high price volatility in both Cubes and underlying Nasdaq securities in 2000 and early 2001, we are not aware of any comprehensive studies that have established that trading in Cubes has caused or exacerbated volatility in underlying securities. Many market commentators, instead, attribute much of the recent volatility in Nasdaq securities to other, more conventional factors. For example, they point to uncertain profit outlooks for many technology issues whose share prices were overvalued under traditional valuation models.

Nevertheless, we recognize that the Commission and the self-regulatory organizations (SROs) must remain vigilant in this area. In the case of index futures trading in the 1980s, the broader market effects of rapidly developing cross-market trading strategies were not readily apparent until periods when market liquidity was severely strained, as during the October 1987 market break. We, therefore, will continue to work with the SROs to monitor trading in Cubes and how this activity might be affecting trading in underlying securities.

In terms of short selling, the Commission has treated Cubes in the same manner as other securities, such as options, that derive their values from prices in underlying securities. As a result, Cubes have not been subject to the Commission's Short Sale Rule, which generally prohibits executing short sales in an exchange-listed security except: (i) at a price above the price at which the immediately preceding sale was effected (plus tick), or (ii) at the last sale price if it is higher that the last different price (zero-plus tick). This is generally known as the "Tick Test" for short sales. The underlying Nasdaq securities for Cubes, however, are subject to the NASD's own short sale rule. NASD Rule 3350 generally prohibits short sales in National Market System Securities (NMS Securities) at or below the current best (inside) bid as shown on the Nasdaq screen when that bid is lower than the previous best bid. This is commonly referred to as the "Bid Test" for short sales. The short sale rule for individual securities limits the transmission of short sales pressure from the Cubes to the underlying securities.

The Commission is currently conducting a comprehensive review of short sale regulation. This review will consider possible unified approaches for how the Commission and the SROs should address the potential market effects of short selling both on exchanges and in the over-the-counter market. Our review will also consider the cross-market implications of differing short sale regulatory approaches in derivative instruments and their underlying securities.

Question 2:
What steps is the SEC, as regulator, taking to ensure that the impact of any new instrument, such as Cubes, is fairly traded?

Response:
The Commission's market oversight programs seek to ensure that the SROs maintain adequate rules and procedures to properly address instances in which trading practices in any security, including Cubes, appear to be inconsistent with investor protection and the integrity of the markets. Trading in Cubes is subject to SRO surveillance and investigatory programs designed to detect and prosecute manipulative or abusive practices. In addition, all of the SROs trading Cubes are members of the Intermarket Surveillance Group ("ISG"). The ISG is designed to provide a framework to ensure that the SROs are adequately sharing surveillance information and coordinating inquiries and investigations among themselves and with the Commission in order to address potential intermarket manipulations or trading abuses in any multiply traded securities, including Cubes. Moreover, the Commission's inspection program routinely reviews the adequacy of each SRO's surveillance, investigatory, and disciplinary programs.

Question 3:
Does the SEC have sufficient authority and sufficient personnel to keep up with the pace of changes that are occurring in the markets? Would the SEC make legislative recommendations to Congress if it believes new trading trends warrant additional regulation?

Response:
Because the federal securities laws in many cases provide broad proscriptions and goal- oriented grants of authority, the Commission believes that it currently has sufficient authority to keep up with the pace of changes that are occurring in the markets. Moreover, while we believe that our existing resources are adequate, the myriad of issues raised by complex new financial products, technology, and the globalization of our capital markets will require additional resources in the coming years.

As it has done in the past, the Commission will make legislative recommendations to Congress if it finds that it lacks the authority to address new trading trends that warrant additional regulation.

WEDNESDAY, MAY 23, 2001.

U.S. SMALL BUSINESS ADMINISTRATION

WITNESS

JOHN WHITMORE, ACTING ADMINISTRATOR

OPENING STATEMENT OF CHAIRMAN WOLF

Mr. WOLF. We are going to begin. There are going to be four votes stacked, and maybe we can try to get as much in before that. Otherwise, we will have to recess and come back. But why don't we welcome you.

I will just submit a statement for the record.

[The information follows:]

We are pleased to welcome today Mr. John Whitmore, the Acting Administrator of the Small Business Administration. Today's hearing will focus on the SBA's budget request for fiscal year 2002.

The fiscal year 2002 budget request for the SBA totals $539 million, a reduction of almost $319 million, or 37% from the FY 2001 funding level.

This startling reduction in your appropriations request is frankly not sustainable. The reason is that the budget request is based upon the enactment of separate authorization measures which would increase the user fees for your flagship 7(a) general business loan program, increase the user fees for the Small Business Investment Company program, charge new fees to users of Small Business Development Centers, and raise the interest rates on disaster victims seeking to rebuild their homes or revive their businesses. The Congress is unlikely to enact any of these measures, all of which have faced nearly unanimous bipartisan opposition in the past.

Today, we will want to discuss how the SBA is improving its lending and assistance programs, and get your input on the true funding needs for these programs, as we cannot rely on the President's request for that information.

Mr. WOLF. You can begin. You can summarize your statement. Your full statement will be put in the record.

Mr. WHITMORE. Thank you, Mr. Chairman.

OPENING STATEMENT OF THE ACTING ADMINISTRATOR

Mr. Chairman, thank you for inviting me here today. I am pleased to present the Small Business Administration budget request for fiscal year 2002.

The budget request of $539 million represents a renewed focus on SBA's core programs. It will provide capital, credit, procurement and technical assistance to America's small businesses at a substantially reduced cost to the taxpayer.

It includes $5 million for SBA's portion of the President's New Freedom Initiative to help comply with the Americans with Disabilities Act and $5 million as part of the Paul G. Coverdell Drug Free Workplace program.

The budget also seeks to streamline the agency and eliminate duplicative programs.

The budget proposes funding SBA technical assistance programs at least year's level with three exceptions.

We are proposing to increase funding for the SCORE program by $250,000 up to $4 million. SCORE is one of the SBA's most cost-efficient programs and will soon implement an electronic delivery system that will broaden its reach.

The Veteran's Business Development Program, which was not funded in 2001 but will receive $750,000 in 2002.

The budget proposes a funding level of $88 million for the Small Business Development Center Program, the $75.8 million coming from appropriations and $12 million in fees. Some SBDCs already impose a variation on a counseling fee by requiring new start-up businesses to take a training course at a cost of between $35 and $45 before receiving counseling. This is also in line with other SBA technical assistance programs, such as the Women's Business Center Program. Charging a modest fee of under $11 an hour will maintain the current service level while reducing the expense to the taxpayer.

The budget proposes funding for Government Contracting Assistance Programs at 2001 levels. However, it does include $500,000 for a women's contracting initiative and a contract bundling study.

The budget fairly demands that those who benefit most from SBA's programs share in the cost. In the exact language of the President's budget:

> These programs will become self-financing by increasing fees. The budget acknowledges that some small businesses may have trouble accessing private capital in the absence of a Government guarantee, but does not require the Government to subsidize their cost of borrowing. The budget increases fees sufficiently to make these programs self-financing and would save $141 million.

This would reduce the burden on appropriations, will allow for expanded program levels, and is fair to the taxpayer.

The budget proposes increasing fees in the Small Business Loan Program and the Small Business Investment Company Program. In the Small Business Loan Program, the budget raises fees for small business loans above $150,000. There is no fee increase for loans made under the $150,000 benchmark and continues a rebate to the

lender. We hope this will encourage smaller loans to those who are in the start-up phase in business. This will also serve to provide capital to those most in need and will support a zero subsidy rate.

The SBA's new administrator faces many challenges once confirmed. Two principal large-scale challenges include: antiquated programs and delivery systems that are out of touch with today's dynamic small business environment, and resource and personnel questions. SBA needs to transform itself into an entity that is governed by efficiency, flexibility, and empowerment of small business through knowledge.

More specifically, within the SBA's business loan program the number of loans has decreased 21 percent over the last 5 years, while the dollar volume has increased 26 percent. While the dollar volume in loans has increased, the Small Business Loan Program suffers from a lack of reach. Larger loans have gone to fewer companies.

This is where the program faces the biggest challenge. Cultivating businesses in their initial stage of growth is crucial in advancing America's small business community. This is where SBA should focus its attention. This is true gap lending.

The fastest growing groups in America's small business community are Hispanics and women-owned businesses. These groups, along with African Americans, Native Americans and veterans are also the most underrepresented in SBA's Small Business Loan Program. Significantly, loan volume to women, veterans and other minorities has been flat or trended down.

Another major challenge facing us is to focus on the current organizational and functional structure of SBA. This challenge has been exacerbated in recent months by the hiring of 70 people in the November-January period without regard to the agency's top priorities of loan monitoring and lender oversight.

The SBA's Loan Monitoring System is a project that was authorized in December of 1997, with $8 million appropriated each year since 1998, for a total appropriations to date of $32 million.

In early February, after I became the Acting Administrator, the staff informed me that that project—estimated at $40 million—was headed towards $90 million; and instead of 4 years, it would take 7. I began looking into the status of the project and reported my finding to both your committee and the oversight committees. In brief, I have concluded that the congressionally mandated Loan Monitoring System has become commingled with an internally sought modernization initiative, where costs and timeline for implementation were to have risen significantly. I have since directed that the program be refocused on that which Congress intended.

With that in mind, we have signed a contract with KPMG to provide us with expertise in accessing available options.

SBA intends to evaluate current systems at established financial institutions which already have operational risk management and loan monitoring systems. We believe they can meet our needs in a timely and cost-effective manner.

Other elements of SBA's modernization effort will wait until the Loan Monitoring System is fully operational.

Thank you. I will be pleased to answer questions.

[The information follows:]

STATEMENT OF

JOHN WHITMORE
ACTING ADMINISTRATOR

U.S. SMALL BUSINESS ADMINISTRATION

SBA'S FISCAL YEAR 2002 BUDGET REQUEST

BEFORE THE

SUBCOMMITTEE ON COMMERCE, JUSTICE, STATE & THE JUDICIARY

COMMITTEE ON APPROPRIATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

107th Congress, 1st Session
MAY 23, 2001

Mr. Chairman, Ranking Member Serrano, and members of the subcommittee, thank you for inviting me here today. I am pleased to present the U.S. Small Business Administration's (SBA) budget request for Fiscal Year 2002. This request of $539 million signals a renewed focus on SBA's core programs and a commitment to do them well. It will provide record levels of credit, capital, procurement, and entrepreneurial development assistance to America's 25 million small businesses at one of the lowest costs to the taxpayers ever. This is a fiscally sound budget request that will provide more than $17.5 billion in loans and guarantees, and counseling and training assistance to over 1 million firms and entrepreneurs, to help them start, sustain and grow their businesses.

As I said, this budget request will allow us to focus on our core programs and delivering them to those who need them most. The proliferation of new programs at the SBA has come at a cost of diluted focus and lack of attention to our bread and butter programs. We are concerned with the recent performance of key programs, such as our 7(a) loan, 8(a) business development assistance, and HUBZone programs. We are concerned that neither our programs nor our delivery structure are ready to serve small business needs in 2002 and beyond. We will present the Administrator, upon his confirmation, with an array of decision options to address these and other concerns.

FINANCIAL ASSISTANCE PROGRAMS

President Bush's budget will provide SBA's Financial Assistance Programs with a record level of financial support to our nation's small businesses - $17.5 billion. SBA's 7(a) Loan Guaranty Program, SBA's primary loan program, will support $10.7 billion in lending while

saving the taxpayers $114.5 million. The savings will be accomplished by increasing the tax-deductible fees to those who benefit from the larger loans in the 7(a) program and to those Small Business Investment Companies using participating securities. However, loans of $150,000 and less will have no change in their fees. In FY2000, of the 43,748 total number of 7(a) loans, approximately 60 percent were under $150,000. For specific groups of borrowers, loans under $150,000 made up:

- 69 percent of the 2,000 loans to African Americans,
- 58 percent of the 5,359 loans to Asians,
- 65 percent of the 3,221 loans to Hispanics
- 81 percent of the 525 loans to Native Americans,
- 69 percent of the 4,809 loans to veterans, and
- 74 percent of the 9,206 loans to women.

From FY1995 through FY2000, the number of SBA 7(a) loans dropped from 55,591 to 43,748, while the dollar volume of loans increased from $8.26 billion to $10.5 billion. The number of loans to Asian-Americans went up dramatically, but for Native Americans, other minorities, women and veterans, loan numbers have remained level or gone down slightly—even though businesses owned by Hispanics and women were the fasting growing segments of the business community.

In an effort to encourage more of these smaller loans, the President's proposal makes no change in fees for loans under $150,000. The proposal aims to encourage the smaller loans that many banks are reluctant to make, which are the ones that help the neediest of small businesses.

Finally, eliminating the need for appropriations will ensure that the 7(a) Program will not run out of money if there is a significant increase in demand, an approach that has worked well for other SBA programs.

The 504 Certified Development Company Program provides financing for major fixed assets. The program will provide $3.75 billion in lending in FY 2002, the same as FY 2001, with a slight decrease in the fee paid by the users of the program. This program has not had a subsidy from taxpayers since FY 1996. The 7(a) proposal is based on the 504 model.

Through the Microloan Direct Program, SBA provides small loans up to $35,000 to small businesses through a network of locally based not for profit intermediary lenders. The FY 2002 budget will provide $20 million for new loans to intermediary lenders. The average loan to microborrowers in this program is $10,500 and over the last five years the average number of microloans made each year has been around 1,500. Small businesses in economically distressed urban and rural areas have benefited from this program. The Microloan technical assistance aspect of the program will also receive $20 million in FY 2002. These funds will be used to support technical assistance to microborrowers, increasing their chance of success and enhancing their ability to repay their loans. Training and other technical assistance will also be funded to help additional microbusinesses obtain financing from sources outside SBA.

The program level for the Small Business Investment Company (SBIC) Program, a venture capital investment program, will increase to $3.1 billion in FY 2002, an increase of $600 million over FY 2001. With a small increase in fees for participating securities, the SBIC

Program, including the debentures program, will be fully self-supporting. I note that the National Association of Small Business Investment Companies accepts this approach because it allows for a larger program volume.

The Surety Bond Guarantee Program guarantees bid, performance, and payment bonds for small business contractors working on construction, service and supply contracts for public and private sector projects. The program will be level funded at $1.7 billion and does not require taxpayer funds.

COUNSELING & TECHNICAL ASSISTANCE PROGRAMS

The budget provides $5 million as SBA's share of the President's New Freedom Initiatives. The funds will provide technical assistance to help small businesses comply with the Americans with Disabilities Act (ADA) and hire more people with disabilities. This funding will also help SBA increase awareness and promote use of the Disabled Access Credit, which provides a 50 percent tax credit on up to $5,000 of eligible expenses annually to help small businesses make their facilities ADA compliant.

The budget includes funding for the Paul D. Coverdell Drug-Free Workplace Program that awards grants to organizations helping small businesses establish drug-free workplace programs. This is part of the President's initiative to combat drug abuse. To date, SBA has not been able to meet the demand for assistance from intermediary partners. For example, in 1999 SBA received 160 grant applications from intermediaries, but issued only 16 grants. To help

meet this need, the President's budget includes $5 million and proposes to spend $25 million over the next five years.

Business Information Centers (BICs) provide both counseling and information for start-up and early operating businesses. There are 70 locations nationwide in both distressed and non-distressed areas. The program will be level funded at $500,000.

One Stop Capital Shops (OSCSs) provide financial and business assistance to small businesses. Located in 22 socially and economically disadvantaged areas nationwide, OSCSs will be level funded at $3.1 million.

Small Business Development Centers (SBDCs) provide management and technical-assistance. This 21-year old program has slowly evolved as a counseling program for more mature businesses, not start-up businesses, although SBDCs do counsel some start-ups.

SBDCs will receive $76 million in FY 2002, plus $12 million through the collection of nominal fees-for-counseling, as is currently done for training. After the initial *first free hour*, the estimated cost will be $10.75 per hour. The average use of counseling is 5.3 hours, which means clients will pay on average $46.23 for counseling. The fee proposal will allow the program to continue to grow while reducing the expense to the taxpayers. Currently the average SBDC counseling case costs Federal and state taxpayers approximately $700.

Charging fees is not precedent setting. SBDCs have always charged fees for training and other services, such as publications and conferences. Some SBDCs already impose a variation on a counseling fee by requiring new start up businesses to take their training course, at a cost of $35-$45, before receiving any counseling. During 1998 (the latest year that figures are available), SBDCs generated over $7 million of program income over and above their Federal and matching funds.

Beneficiaries of most SBA programs pay fees, directly or indirectly, including fees for loan programs, investment capital, pre-qualification counseling. Even some of our small Women's Business Centers charge fees in excess of $50 per hour for counseling.

In FY 2000, the SBDCs trained 326,000 clients and counseled 262,000 clients. From FY1995 to FY2001, SBDCs funding increased $14 million while funding for SCORE only increased $500,000 and funding for 7(j), a technical assistance program for all low income areas as well as 8(a), was reduced by $4.5 million.

For the Service Corps of Retired Executives (SCORE), we are proposing to increase to $4 million the amount to help pay the expenses of the 11,400 SCORE volunteers. These volunteers counseled and trained over 377,000 clients in FY2000. SCORE is making more and more use of electronic means to be able to use its expert counselors anywhere in the country.

A recent *Washington Post* article recounted how SCORE counselors Gene Rosen and Herbert Robinson helped Sarah Hill start an antique business in Alexandria, Virginia by

providing invaluable assistance on many aspects of their business, from negotiating the lease to pricing merchandise. The time and advice of these volunteers was free. The government paid 34 cents a mile for their expenses. Sarah is projecting annual sales of over $100,000 in each of the next several years.

The SBIR (Small Business Innovation Research) Program awards grants or contracts to small businesses for their innovative ideas to meet the specific research and R&D needs of the federal government. SBA's budget will provide $5.0 million in FY 2002 to fund two programs to help small businesses compete for SBIR awards. The FAST (Federal and State Technology Partnership) will receive $3.5 million under this proposal. The SBIR Technical Assistance Outreach Program will receive $1.5 million.

A nationwide network of U.S. Export Assistance Centers (USEACs) combine in single locations the trade-promotion and export-finance assistance of the SBA with the programs of the Department of Commerce and the Export-Import Bank. USEACs will be level funded at $3.1 million.

The Veteran's Business Outreach Program will receive $750,000 in FY 2002. The program ensures that small businesses owned and controlled by eligible veterans have access to entrepreneurial training, business development assistance, counseling and management assistance. The program was not funded in FY 2001. The Veterans Business Development Corporation, which was funded at $4,000,000 in FY 2001, will no longer be funded through SBA's budget, but will have its own separate appropriation.

Women's Business Centers (WBC) provide women entrepreneurs with business training and counseling, technical assistance, mentoring, and access to SBA's programs and services. The centers also have programs to assist economically and socially disadvantaged women, especially those on welfare. Each center tailors its services to the needs of the local community. SBA awarded 15 new grants, funded 62 centers with regular grants, and provided sustainability grants to seven centers with its FY 2001 appropriation of $12 million. In FY 2002, the budget request is for $12 million.

The Women's Council supports programs and research on behalf of women's business enterprise. In the President's Budget, the Council will receive $750,000 in FY 2002.

In FY 2000, women business owners received only 2.8 percent of Federal procurement dollars. The Office of Federal Contract Assistance for Women Business Owners (CAWBO) was established within SBA's Office of Government Contracting to increase the number and size of federal contracts to women business owners. Additionally, the Office of Government Contracting is charged with providing studies on how contract bundling affects all small businesses. We request $500,000 to implement a recently-enacted procurement initiative, including conducting a legislatively mandated study on women's procurement, creating a contract bundling database, and conducting analysis of procurement trends and practices.

The 8(a) Business Development (BD) Program assists the development of small companies owned and operated by socially and economically disadvantaged individuals. Eligible

companies may be awarded set-aside federal contracts and other business development assistance. The number of contracts in this program has gone down. The new Administration is looking at ways to more efficiently and effectively run this program. In the interim, funding for FY2002 is requested at the same level as FY2001.

The HUBZone (Historically Underutilized Business Zone) Program encourages economic development in distressed areas through the establishment of Federal contract award preferences for qualified small businesses located in such areas. This program has gotten off to a very slow start. Under the President's budget, the program will receive $2 million in FY 2002, the same as FY 2001 again with an emphasis by the new Administration on more efficient and effective ways to fulfill the intent of the program.

PRO-Net (Procurement Marketing & Access Network) is a government-wide online database used as a link to procurement opportunities and as a marketing tool for small companies. We request level funding at $500,000.

The 7(j) Technical Assistance Program provides management and technical assistance to small and emerging businesses owned and controlled by socially and economically disadvantaged individuals and also individuals in areas of low income and high unemployment. Under the President's budget, the program will receive $3.6 million in FY 2002.

DISASTER ASSISTANCE LOAN PROGRAM

The Bush Administration is fully committed to meeting the needs of disaster victims and has proposed a base loan volume of $300 million for SBA's Disaster Assistance Loan Program. Additional needs for the Disaster Program will be funded through the proposed National Emergency Reserve.

However, there will be no interest rate change for disaster home loans. Under the President's proposal, businesses without access to credit elsewhere will receive disaster assistance loans at the U.S.Treasury Rate, with a ceiling of 8 percent. Based on current rates, the business loan interest rate would be increased from the current 4 percent ceiling to 5.4 percent. On an average loan of $56,300 over 15 years, the monthly payments would rise from $429 to $473. Over the life of the loan, the business would incur an additional cost of $7,344. Also, SBA will have the flexibility of keeping the payment at $429 by extending the maturity of the loan.

SBA OPERATING COSTS

Although the budget request proposes a small increase in SBA's operating costs, we are looking at streamlining SBA's operations and doing away with redundant programs. SBA will contract out, as appropriate and consistent with the Federal Activities Inventory Reform (FAIR) Act, and will continue its asset sales program.

A major challenge facing SBA is improving its level of customer service to meet the growing and changing needs of small business. Over the last 10 years, SBA has dramatically changed the way it delivers services to small business, using private-sector partners to make and service its loans

and to provide training and counseling. Yet the structure has not changed. For example, by taking advantage of electronic commerce, the oversight function carried out today by SBA's Procurement Center Representatives could be streamlined and centralized.

SBA has been downsized over the last eight years, but its structure has not. SBA still needs to reduce its staff while maintaining critical positions.

SBA met with GAO on April 27, 2001 to discuss the findings in its study of SBA's structure. We will take an aggressive look at additional privatization and streamline what we do to reduce duplication and increase efficiencies. We will develop succession plans and reprioritize the use of resources. We will be preparing options for the confirmed Administrator to ensure that both SBA's programs and structure can serve America's small businesses efficiently and effectively.

LOAN MONITORING SYSTEM

SBA's loan monitoring system (LMS), a four-year project authorized in December of 1997 with $8 million appropriated each year since FY 1998, is undergoing a substantitive review. In early February 2001, after I became Acting Administrator, I began looking into the status of the project. I have reported my findings to both your Committee and the Authorizers. In brief, I have concluded that the LMS had become commingled with an internally-sought Systems Modernization Initiative (SMI).

I have since ordered that the program be refocused on the activities for which the Congress authorized and appropriated the funds–an information technology-based system for

risk management, lender oversight, and loan monitoring. SBA intends to contract on a pilot basis with several established financial institutions that already have operational risk management/loan monitoring systems. Rather than develop a proprietary system – with all its attendant costs and risks – we intend to determine if such a system already exists.

To this end, we have put Janet Tasker in charge of overseeing all of our lender and portfolio oversight. She is a Certified Public Accountant (CPA) and served as the Director of the Office of Government Sponsored Enterprises Oversight, responsible for providing oversight to FANNIE MAE and FREDDIE MAC. She is taking the lead for the LMS project and has developed the requirements for our LMS system. These concepts have been presented to your staff and the GAO. We are in negotiations with highly experienced project management organizations to provide us with the expertise to manage and assess the various options that are available, and to assist us in presenting those options to our new Administrator upon confirmation. In FY2002, we have requested an appropriation of $8 million to bring the original program's scope to completion.

At this point, I emphasize that the agency must have a new financial system in place by the end of this fiscal year—September 30, 2001—when the current Federal Financial System run by Treasury is scheduled to be phased out. SBA is proceeding with an Oracle-based integrated standard general ledger that will integrate program and accounting data, resulting in more timely and accurate financial reports and program analysis. This is one of the elements of SMI I felt we must pursue. Other elements will wait for decisions by the Administrator after his confirmation.

PROGRAMS THAT WILL NOT BE FUNDED IN FY 2002

The Administration supports the objectives of the New Markets Venture Capital (NMVC) Program but believes those objectives can be achieved more efficiently and at a lower cost through other existing means. Several vehicles and incentives to direct investment into economically distressed communities already exist. Communities targeted by NMVC have access to a wide range of private for-profit and economic development programs, including the federally supported community development financial institutions administered through the Department of Treasury. In addition, SBA's SBIC program, which has 412 licensed venture capital companies with total capital resources amounting to $17.7 billion, is implementing incentives to encourage investment in economically distressed areas.

The NMVC Program is also expensive relative to the impact it is expected to have. The total cost of the program in FY 2001 is $52 million, not including the administrative cost of running the program. Since the program is expected to generate $150-$200 million of investment activity, it will yield only $3.00-$4.00 of investment for every taxpayer dollar spent. In comparison, under the Small Business Investment Company (SBIC) Program, there is no cost associated with the debenture portion of the program. The participating securities portion of the SBIC program required a $26.2 million credit subsidy in Fiscal Year 2001. Since this subsidy generates $3 billion of investment activity, each taxpayer dollar spent provides $114 of investment activity in the participating securities program.

The NMVC legislation also included a $15 billion tax credit for new investment in the same communities targeted by the NMVC Program. The Administration believes that targeted

tax policy and other private sector incentives are the right formula to spur economic development with less emphasis on government outlays. The NMVC Program has been funded in FY 2001. However, until the program can show some results in the way of established return on equity, any additional funding would be premature.

The Program for Investment in Microentrepreneurs (PRIME) Program, like the NMVC Program, is duplicative of existing SBA programs and other programs within the Federal government and the private sector, i.e., community development organizations and local financial institutions. SBA has a wide array of funded grant programs that provide technical assistance to small businesses. SBA's Microloan Program, for example, provides grants enabling intermediaries to provide marketing, management, and technical assistance to individual microborrowers. Additionally, the Microloan Program provides funding to non-lending technical assistance providers to help low-income individuals start or improve their own business. Microloan intermediaries and non-lending technical assistance providers are the same groups targeted by PRIME grants. There are also other private-sector entities, such as trade organizations, whose members are engaged in the microenterprise industry and provide similar services. Other SBA programs available for these customers include SCORE, SBDCs, OSCS and WBCs.

The Business Learning, Innovation, Networking and Collaboration (BusinessLINC) program was designed to create and foster mentor-protégé relationships that would promote the growth of small businesses by matching them with larger concerns. The program is similar to other SBA technical assistance programs already in place. One of SBA's most successful technical assistance programs, SCORE, manages a nationwide network of 11,400 volunteers who provide free expert

advice based on their many years of experience on virtually every aspect of business. SCORE's free counseling service provides a mentor framework to assist small businesses similar to that envisioned for BusinessLINC. The SBDC consulting service is another means of providing technical assistance and services to more mature companies seeking to expand their relationships or customer base to include larger concerns. SBA also provides the 8(a) mentoring program and a women's mentoring program. Other agencies such as the Department of Defense and NASA support mentor – protégé programs.

BusinessLINC is duplicative of SBA's 7(j) management and technical assistance program, which authorizes contract grants and cooperative agreements to organizations that provide direct assistance to small and emerging businesses owned by socially and economically disadvantaged individuals. SBA is authorized to target 7(j) services to businesses and individuals located in areas of high unemployment and low income. Many of these providers were successful in fostering business-to-business relationships between larger and smaller firms. Service providers report direct assistance to nearly 3,000 eligible businesses. Many BusinessLINC activities can be accomplished using the existing 7(j) authorization.

BusinessLINC was designed to provide small businesses with an online information source and database of companies interested in mentor-protégé programs. These goals may be achieved through existing BICs, WBCs, TBICs, OSCSs and PRO-Net. Private sector alternatives that would provide incentives for larger businesses to enter into mentoring programs should also be examined.

As I mentioned at the beginning of my testimony, SBA's FY 2002 request is a good budget for small businesses. Thank you for the opportunity to appear here today. I will be happy to answer your questions.

Mr. WOLF. Before I have questions, Mr. Serrano.

Mr. SERRANO. No comment, Mr. Chairman; just to welcome the Acting Administrator and look forward to some exchanges.

Mr. WOLF. When will your new administrator be on board?

Mr. WHITMORE. We were hopeful he would be on by the beginning of May. We are hopeful by the end of June.

BUDGET REQUEST FOR BUSINESS LOAN PROGRAMS

Mr. WOLF. You have not requested any appropriations for your 7(a) General Business Loan Program or for your Small Business Investment Company Participating Securities Program. Why is that?

Mr. WHITMORE. Mr. Chairman, we believe that those that benefit most from the program should help share in the cost. We are not increasing fees at all on our smaller loans under $150,000. We think that is the area where SBA should be focusing its attention. That is the area where start-up businesses have the most difficulty in getting financing, and the $72,000 loan or the $120,000 loan are very difficult to get. Most of the dollars of our loans are made of larger loans. We think that this will encourage smaller loans, will encourage loans into the communities where we are underrepresented. And we also think it is good for the taxpayer. In the SBIC program the industry has indicated they are willing to accept zero subsidy rate. They are able to do it with some minor exceptions. They would like the full authorized level for the program.

Mr. WOLF. But you are not—are you assuming the legislation is going to pass then? Have you sent the legislation to the Small Business Committee?

Mr. WHITMORE. Yes.

Mr. WOLF. And when are their hearings scheduled? When do you expect them to report it out?

Mr. WHITMORE. We don't know.

Mr. WOLF. Do you think it will?

Mr. WHITMORE. Do I think it will pass?

Mr. WOLF. Yes.

Mr. WHITMORE. I testified at both the Senate Small Business Committee and the House Small Business Committee, and it did not receive favorable review from either side.

Mr. WOLF. And did you know that when you sent it up?

Mr. WHITMORE. No, we did not.

Mr. WOLF. Honestly? Sincerely? If I put you under oath now, could you honestly tell me that you—that this has taken you by surprise?

Mr. WHITMORE. No, I can't say that it has taken me by surprise. The SBA has proposed fees for the lending programs and fees for the other programs over the years.

Mr. WOLF. This is really, though, in essence kind of a gimmick. This is what used to be done in Transportation sometimes with regard to the FAA and the Coast Guard. They would put in fee collections that they knew were not going to take place. They—has this ever been before the Small Business Committees before?

Mr. WHITMORE. Yes, sir.

Mr. WOLF. And how successful was it then? What was the vote?

Mr. WHITMORE. I was not involved at the time. I know we have proposed fees in the past.

Mr. WOLF. But what was the vote on this proposal? You said you have done this before. What was the vote the last time. Was it a close vote?

Mr. WHITMORE. Sir, I can respond for the record.

[The information follows:]

The 7(a) program has had fees associated with it for many years. The original 7(a) guaranty fee was ¼% annually for several years. That fee was replaced by a 1% one-time, up-front fee. The 1% fee was raised to 2% in the 1980s. The up-front guaranty fee has continued to change over the years with the most recent change enacted in December 2000. Under that legislation, the one-time guaranty fee is 2% for loans up to and including $150,000, 3% for loans between $150,000 and $700,000 and 3.5% for loans over $700,000. Beginning in FY 1994, for loans sold in the secondary market only, Congress authorized an annual fee of 40 basis points on the SBA share of the outstanding loan balance. That fee was replaced in FY 1995, by an annual fee of 50 basis points charged for all loans based on the SBA share of the outstanding loan balance.

Also included in P.L. 103–403 enacted in October of 1994, was a limitation on the authority of the Administrator to implement new or changed 7(a) program fees [Section 5(b)(12)]. Under this statute, the Administrator is authorized to collect only those fees that were in effect on September 30, 1994 or which are subsequently specifically authorized by law. Therefore, all fee changes in the 7(a) program occur only after full discussion and Congressional action.

Several years ago there was some discussion about making the 7(a) program self-funding. However, to the best of our memories, no such provision was ever included in proposed legislation. Therefore, there have been no Congressional votes specifically related to this issue.

In regards to the Small Business Development Centers, we are unable to re-create the total history of fee proposals since the beginning of the program in 1984. However, in response to the proposal in the FY '98 budget request to charge fees for counseling, legislation was subsequently enacted to prohibit charging counseling fees.

Mr. WOLF. Does anyone with you know?

Mr. WHITMORE. It wasn't introduced.

Mr. WOLF. It wasn't introduced. You know what you have done, and it is really not good to do it from the budgeting point of view. I think from a credibility point of view, if you want to cut a program or change a program, then—have you been up here lobbying for this? Can you give me the list of the Members of Congress that you have personally gone by to see, asking them to support this program?

Mr. WHITMORE. I have spoken with the chairmen of both oversight committees, and I have talked with the staffs of the ranking members and have talked with a little of the congressional staffs about this. We pointed out that all commercial loans generally carry some fee. The additional fee for a guaranty loan is proposed to go from 3 to 3 and a half. There are fees at least of 1 point, maybe 1 and a half points on commercial loans.

Mr. WOLF. I was more referring to their reaction about what they were going to do with it.

Mr. WHITMORE. I would say in both the House and Senate oversight committees when I testified it was not received favorably.

Mr. WOLF. If the legislation is not enacted, which it now appears that it will not—is that a fair statement that you doubt that it will?

Mr. WHITMORE. I would think that on the SBIC fees there is a chance that that would be enacted. On the 7(a) fees, it was not warmly received.

Mr. WOLF. So if the Committee fulfills your request by appropriating zero for 7(a) what would the effect be on these programs?

Mr. WHITMORE. I think if it was zero, the SBIC program probably would go on. And probably——

Mr. WOLF. What about 7(a)?

Mr. WHITMORE [continuing]. Have a fully authorized level. In the 7(a) program, if we did not receive an appropriation and fees were not enacted, the size of the program would be cut significantly.

Mr. WOLF. The 7(a) programs guarantees up to $1 million of a $2 million maximum private sector loan to small businesses for every conceivable business purpose. This is your flagship program. Do you consider this so?

Mr. WHITMORE. I would say it is, sir.

Mr. WOLF. How many guarantees were provided on the 7(a) program last year?

Mr. WHITMORE. In fiscal year 2000 there was approximately 43,000 loans.

Mr. WOLF. What was the total dollar amount of the loans guaranteed?

Mr. WHITMORE. $10.5 billion.

Mr. WOLF. Under the current authorization law, how many 7(a) loan guarantees will you be able to issue in fiscal year 2002 if we appropriate no funds as you requested?

Mr. WHITMORE. Mr. Chairman, I didn't calculate that. It would be whatever the amount of the fee structure that is currently in place with that amount would support. You would have some amount of carryover funds.

Mr. WOLF. How much carryover do you have?

Mr. WHITMORE. Twenty or 30 million, we would estimate.

Mr. WOLF. So how many loan guarantees will you be able to issue then if we do no money?

Mr. WHITMORE. Roughly that would be about a fourth of the $10.7 billion—$2.8 billion.

Mr. WOLF. Assuming there is no change to the authorization law, how much in appropriation would be required to subsidize the $10 billion 7(a) program level?

Mr. WHITMORE. $107 million.

Mr. WOLF. I am going to recognize Mr. Serrano after just two more questions.

Mr. SERRANO. Thank you.

SBIC PROGRAM

Mr. WOLF. The SBIC participating securities program guarantees supplementary borrowed funds to privately owned SBICs to serve as a source of equity capital to help qualified small business enterprises secure the equity to start a business. Likewise, assuming no change to authorization to raise fees, how much in appropriations would be required to subsidize 2 billion SBIC participating in a security program level?

Mr. WHITMORE. Approximately $38 billion.

Mr. WOLF. $38 billion?

Mr. WHITMORE. Excuse me—$38 million.

Mr. WOLF. Do you want to check that? We will leave that down, but for the record do you want to——

Mr. WHITMORE. I would like to respond in writing.

[The information follows:]

A subsidy of $46.5 million would be required for a $2.5 billion program level.

SUBSIDY RATES OF SBA LOAN PROGRAMS

Mr. WOLF. We understand that the GAO is currently reviewing your processes for setting subsidy rates for your loan programs, particularly whether those rates are overstated and are resulting in overestimated appropriations and fee collection requirements. When do you expect to get GAO's findings and recommendations?

Mr. WALTER. Mr. Chairman, I am Greg Walter.

We had our entrance conference with GAO this morning on the subsidy rate process. They have an ending date of their review of July 29th where they have to report back to the Small Business Committees. So we expect to know the outcome of this by July 29th.

Mr. WOLF. If the report indicates that subsidy rates in your fiscal year 2002 budget are inaccurate, would you formally submit a recalculation of appropriation requirements for all of your loan programs so we can factor any changes into that 2002 bill?

Mr. WHITMORE. I don't believe OMB would submit for the 2002. I think it would be in the next go around. We certainly could ask them. But I think their intention would be on the next submission that they would take those into consideration.

Mr. WOLF. Mr. Serrano.

INADEQUACIES OF BUDGET REQUEST

Mr. SERRANO. Thank you, Mr. Chairman.

Mr. Whitmore, I am baffled. You have been around this agency for awhile, and you know that the entire time I have been on this committee I have been very supportive of SBA's work. I make no secret about the fact that my support was based primarily on the fact that I believe SBA renders a great service to our country and, but also because during the last Administration I was very thrilled to have an Administrator whom I knew since my early days and sadly had nothing to do with her appointment. So the combination made me a big fan.

Now, you are asked—because I know you are not doing it yourself—you are asked to come here with a 40 percent cut. It seems to me a desire to destroy this agency. I am wondering, one, what your feelings are about this 40 percent cut; and, two, how can you justify—you or anyone. I am not trying to put you on the hot seat because you are not going to be there, but how can we claim that we intend to make this agency grow and serve our Nation with these kinds of cuts? And rarely, by the way, do you get them.

Why didn't you ask for more? Our tradition is to say, why are you asking for so much? But this one is kind of ridiculous.

Mr. WHITMORE. Some of the projected 40 percent cut is really not apples to apples, at least in my opinion. Some of them have to do with initiatives that we generally wouldn't request in our budget

routinely. It also takes into account programs that we think were added last year that were duplicative to other programs.

With regard to the fees both in the SBDC program and the 7(a) program, we think that the amount of costs to the business is rather insignificant. On a million dollar loan, the cost would probably be around $42 a month to add these fees. We think it would allow us to expand the program in size. We would not need additional appropriations. We also think it would help us to focus on loans under $150,000, which we think is really where the most demand for our program is and where we are not meeting the needs.

Mr. SERRANO. Well, I am wondering how this budget request is put together. Now, we understand that there are no Bush Administration appointees. If there were, the easiest thing for me to do would be to say, well, the agency now is already run by 50 percent Bush appointees, and Republicans want to cut the budget everywhere, and so this is the result. But this is not the case. So how did this happen? Is this the request from SBA to OMB? And why would this request then be so dramatically different than we saw in the last few years?

Mr. WHITMORE. I wasn't involved when the request was made to OMB, so I cannot answer that question.

I can tell you that one of the other things——

Mr. SERRANO. But you could answer or help me understand who or which group of people make this request?

Mr. WHITMORE. The original budget I believe is submitted in the fall. Mr. Walter just informed me the budget was not submitted in the fall because of the transition. When I arrived, the budget had already come back from OMB.

Mr. SERRANO. I think it is a proper question to just find out, and maybe you could supply an answer for the record later. But I think it is a proper question for this committee just to find out whose idea this was for this budget.

[The information follows:]

Because of the short transition period for the new Administration, the budget was developed and approved with minimal policy input from SBA and input only from transition policy officials at OMB.

Mr. WHITMORE. If I could go back to the cut of 40 percent, what I was saying is the Disaster Assistance Program is not being cut, and there is a proposal in the Administration's budget to fully fund it at a 5-year level. It is proposed to fund it through a national emergency reserve account.

We are understanding that it is being negotiated with appropriators and SBA would be fully funded. We think it is a better way for SBA, but that is a hundred and some odd million dollars of the cut. It is not a cut in the assistance to disaster loans, it is just not coming through the SBA budget. We would be able to draw down on that as we used up the funds that were in our budget.

In addition, funding of legislative initiatives, we normally don't request in our budget every year. So that is over $150 million of the difference between this year and last year alone.

So the cut is not a 40 percent cut, we don't think, when we compare apples to apples. We do think that the counseling fee proposed for SBDC is unreasonable, given the fact that, the SBDC charge fees right now asking fees for counseling, when they already charge

for training, and $11 is a very reasonable amount of money over a course of a year.

In addition, as I said, on the 7(a) loan program we are concerned certainly that the amount of loans have decreased significantly at SBA in the last 5 years. We have seen African American loans going from 2,700 loans to only 2,000 loans Nation-wide. We think that we can do a better job in those areas, and we think this would actually help us because there are no fee changes on small loans.

Mr. SERRANO. Let me ask you, around here the process usually is people ask for a certain amount of money, and then somebody decides to cut them or it goes somewhere. But when a person or a group, again, an agency comes in willingly with such a drastic cut, you wonder if you are not signaling that you really don't want any negotiations between the House and the Senate or between the two parties to bring your amount up.

Now, with that in mind and with the shortcomings that the Chairman has to deal with and this subcommittee has to deal with when we get our allocations, coming up with the additional money is not going to be that easy. So with that in mind, what do you think the impact of this terrible cut here would be on the Nation's small business community?

Mr. WHITMORE. Mr. Ranking Member, I don't think we are proposing cutting the programs. We are proposing to fund them in a different way. The 7(a) program could completely be funded through fees, and it would not require an appropriations, and we would not be limited to $10 billion.

Mr. SERRANO. Those fees—in fact, the climate seems to be for not getting those fees approved. So how are you going to propose to do your job? And listen—incidentally, please understand what I am doing here. I am not trying to give you guys a hard time. I am trying to help you, as I have in the past, do the job you are supposed to do. But it seems to me that you are cutting your own throats here, and at least you should be telling me who put this budget together so I can go talk to them. Because no one seems to know who put this request in, but the request is very dramatic. And notwithstanding the fact that you say it is going to be offset by fees, the Chairman just told you that becomes difficult. That may never take place.

Mr. WHITMORE. Certainly I understand that they may not, but I think that shouldn't prohibit us from looking at new ways to deal with problems and funding programs. This is something that I said earlier, the banks charge fees on a loan that is not SBA guaranteed, asking to pay an additional point for those that are benefitting from the SBA guaranteed program. I don't think is that unreasonable.

NEW MARKETS VENTURE CAPITAL PROGRAM

Mr. SERRANO. Okay. I don't know how much you covered in your opening statement, but could you bring us up to date on the new markets venture capital program and where we are?

Mr. WHITMORE. With the New Market Venture Capital Program, the proposals are due on—I believe May 29th is the final date. We have it scheduled very tightly, but we expect to evaluate those pro-

posals, do the due diligence on them, have them reviewed. We expect to be able to make awards by the end of the year.

Mr. SERRANO. And there has been some concern as to whether the program will reflect to the letter what Congress had intended. What can you tell me about that?

Mr. WHITMORE. I think it will reflect exactly what Congress had intended.

Originally, this rule was put out as an interim final rather than a proposed rule. That caused some problems. It was sent to the Federal Register on January 19th, published on the 22nd. It was put out in a way that I virtually could not get an attorney to resign to go back out. None of the attorneys at SBA thought that the rationale was justified to put that out, so we went back through and reproposed it.

We made a couple of minor changes but one very significant. And the original proposal required investments on the 80/20 basis—eight investments to two in low income areas. This Administration changed that to be 80 percent of the money as well as the number of investments. So I think we are sure we are going to focus 80 percent of the dollars invested in those areas. I think it would certainly meet the intent of Congress.

Mr. SERRANO. Now the funds have to be obligated by the end of this fiscal year. Do we feel that community groups will be able to come up with matching funding—what is it—$6.5 million by September 30th or should we extend that period?

Mr. WHITMORE. Certainly an extension would be helpful. Our time frame is very tight. I can submit the time frame on how we plan to complete the evaluation. If there was an extension, before we determined who were the finalists, then I think it would be fair to everybody, those that have applied right now and those that haven't. If it came after, say, the beginning of July, I think it would be very unfair to those that have already submitted proposals.

The other part of that, Mr. Ranking Member, is the money for the investments themselves is multi-year money. The money for the grant portion needs to be obligated by the end of the year.

Mr. SERRANO. The other one goes to what, 2006?

Mr. WHITMORE. Yes, sir.

Mr. SERRANO. Should we change——

Mr. WHITMORE. The funds are 2 years, but they fund it out for a 10-year basis. It was intended as a 1 time funded program.

Mr. SERRANO. Have you given any thought to asking us to have it perhaps end all at the same time or match the dates properly so we don't have these situations which you face now?

Mr. WHITMORE. No. Certainly it has been discussed, and I think we have discussed it with the committee staff both on the House and Senate side, if there was a way of doing it in a manner that we could be timely and not penalize those that actually are going forward right now. I think we think we are going to get 50 or 60 proposals. That is the estimate the program office has given us. They feel they will be able to match those funds or at least have a program in place to match those funds by September 30th.

Mr. SERRANO. One last question. Could you tell me quickly—I know—is that a vote?

Mr. WOLF. We have 7 minutes left.

Mr. SERRANO. Could you tell me the process by which someone got to apply?

Mr. WHITMORE. We have a footprint that lays out every step of the way on what we do and what we expect them to do. I looked at it yesterday. I looked at the dates to be sure. The applications are due. There will be a review panel and a due diligence panel going simultaneously reviewing these things. Then the proposals are referred for a background check.

At the same time, the firms would be trying to raise both the capital needed and the matching funds for the grant program. But I would be happy to submit that for the record that lays out every step and what time frames we have on that.

[The information follows:]

INFORMATION FOR APPLICANTS TO THE NEW MARKETS VENTURE CAPITAL (NMVC) PROGRAM
Timeline for FY 2001

Date/Day of Week	Action
May 29 (Tue)	Application deadline
June 8 (Fri)	Notification letters sent by ONMVC, advising each applicant of acceptance or rejection for processing, and providing instructions to accepted NMVC company applicants on submission of SF424
June 25 (Mon)	Deadline for screened in NMVC company applicants to return SF424 package to ONMVC
July 12 (Thu)	Notification letters sent by ONMVC, advising each applicant of selection for conditional approval or non-selection, and providing instructions to selected applicants on remaining processing and submission deadlines
July 13 (Fri)	Conference call with all selected applicants, to discuss upcoming deadlines and provide opportunity for Q&A
July 13 (Fri) - August 15 (Wed)	OPGM works with each applicant to finalize grant budget terms
August 1 (Wed)	Deadline for NMVC company applicants to submit to ONMVC request for exception to requirement to raise full amount of grant matching resources (this exception is not available to SSBICs)
August 3 (Fri)	Notification sent by ONMVC on disposition of applicant's request for exception to requirement to raise full amount of grant matching resources
August 10 (Fri)	Deadline for NMVC company applicants to submit to ONMVC all legal documentation
August 13 (Mon) - September 14 (Fri)	OGC works with representatives from conditionally approved NMVC companies to finalize legal documentation terms
August 15 (Wed)	Deadline for all applicants to submit evidence to ONMVC of required amount of grant matching resources

September 14 (Fri)	Deadline for all applicants to submit evidence to ONMVC of required amount of capital
September 28 (Fri)	Notification sent to NMVC companies and SSBICs regarding final action

KEY:

NMVC = New Markets Venture Capital
SSBIC = Specialized Small Business Investment Company
ONMVC = Office of New Markets Venture Capital
OGC = Office of General Counsel
OPGM = Office of Procurement and Grants Management

(Version date: 5/10/01; AMB #25458v1)

Mr. SERRANO. All right. I have of course many more questions.

Mr. WOLF. We have six votes. One 15, one 15 and four 5s. Ms. Roybal-Allard.

NEWMARKETS AND SBIC PROGRAMS

Ms. ROYBAL-ALLARD. Let me associate myself with the remarks that were made by Mr. Serrano and the chairman about, frankly, how shocking it is as that reflects a lack of commitment to small business in this country.

Quickly, one of the questions that I would like to address is that, in your testimony on page 13, you say that the SBIC program is implementing a program to encourage investment in economically distressed areas, and you propose the SBIC program as a substitute for the New Markets Venture Capital Program that you are proposing for additional funding. Now it is my understanding that the SBIC investment dollars made in low income areas are only about 13 percent, 24 if you include moderate income areas, and SBIC investments made to minority-owned businesses are only about 4 percent. What evidence do have you that SBICs are suddenly going to start investing large amounts in economically distressed areas or in minority-owned businesses?

Mr. WHITMORE. Certainly we have encouraged that. And SBIC looked very closely at that. They want to make the best investment possible wherever possible, and I believe they did over $700 million in investments in low income areas last year.

In addition, we think that the New Market Venture Capital Program is going to be running for 5 years here, and it's intent is to be in low income areas.

As I said to Mr. Serrano that we changed the regulations to ensure that 80 percent of the dollars are going in not just 80 percent of the investments. So we think the combination of the two over the next 5 years will increase investment and equity investments in low income areas, in rural areas.

Ms. ROYBAL-ALLARD. So you are basing this really on the hope that there will be greater investment. Because if you look at the record here in terms of what they are doing now, it is obvious that they don't invest in these economically distressed communities. So you are just hoping that they will.

Mr. WHITMORE. We are hoping and encouraging, but we also know that the New Market Venture Capital Program is specifically designed to do that.

Ms. ROYBAL-ALLARD. My understanding is that the New Market Venture Capital Program has been zeroed out.

Mr. WHITMORE. That is not accurate. The New Market Venture Capital Program was authorized for a one-time appropriation which was fully funded, and it is a 10-year program, so it was not zeroed out in the budget. The funding last year of $52 million was intended as a 10-year funding.

Ms. ROYBAL-ALLARD. But you just said that that the new venture capital was part of the—this was not your word—but part of the safety net in terms of what you are attempting to do here. And you just said then this will only be there for 5 years. So what is going to be there to replace it 5 years from now? Or are you just hoping that——

Mr. WHITMORE. I think during the 10-year period we would like to assess both the SBIC program and see how it has done during that period, and also we would like to assess if the 10 years is ample time to assess the New Market Venture Capital Program to determine how it is meeting the objectives and the intent of Congress.

Ms. ROYBAL-ALLARD. Does the SBIC program have a technical assistance component like the new market venture?

Mr. WHITMORE. No, it does not. The technical assistance component in the SBIC program is provided by the venture firm itself. It is not funded by the government.

Mr. WOLF. We are down to 2 minutes. We are going to vote two 15 minutes and four 5 minutes, so we should be back in about——

Mr. KENNEDY. An hour and a half.

Mr. WOLF. I was thinking closer to 50 minutes—an hour probably. We can come back, and then we can go. We will come back in the first 15.

Why don't you just start asking questions?

ASSISTANCE TO MINORITY AND WOMEN-OWNED FIRMS

Mr. KENNEDY [presiding]. All right. This is very powerful now. Thank you.

Congratulations on your position. Obviously, the SBA is very important to a State like mine, Rhode Island.

Joe, how are you? We have had great success because of the leadership of people like Joe Loddo in our State. We have increased—and Joe will just cringe because I don't have all the facts and figures that he has always been so good at telling me—but we are the lead office in the country, or at least under his leadership, for expanding the kinds of loans that help tremendously the small businesses in our State. And because our State is 96 percent small business, the 8(a) program has been a great program.

But what we found is that we still have a lot to do to get people plugged into the 8(a). And pilots—beyond pilots like the 8(a), what are you exploring in terms of assistance to minority-, women-owned firms, both from the technical assistance side, like my colleague had commented on, as well as the financial assistance aspect, given the fact that SBDC funds are level funded? So what——

Mr. WHITMORE. If I could go back to the small loan program, the 7(a) loan program proposal certainly has not been readily accepted, but the point is we really think that the 7(a) loan program could do a whole lot better in minority lending and lending to women. I am sure Rhode Island has done a great job, but in the last 5 years, say, our loans to women have dropped from roughly 13,000, the number of loans, down to 9,000.

Mr. KENNEDY. That is why they brought Joe down here to change that.

Mr. WHITMORE. Making loans right out of 3rd and D street down here.

Mr. KENNEDY. It is not the case up in Rhode Island, not the case at all.

Mr. WHITMORE. I don't have the statistics on Rhode Island. I am looking at the entire program. We think that, in African American lending, we have gone from roughly 2,600 loans down to 2,000 na-

tionwide, only 2,000 loans. Although we have had a slight increase in the dollar amount, the percentage of loans going to African Americans in our program is roughly 3.3 percent. We are not happy with that.

We think that the proposal we have made, although there is not a lot of support for it, to increase fees on the larger loans would allow SBA, without an increase on the small loans, to encourage loans to women-owned, basically start-up businesses. We think that that is really the void in SBA's programs.

The fee increase we are proposing on a million dollar loan would amount to about $42 a month. We are not proposing any increase on the small loans. It is very difficult to get a loan for $82,000. Banks say it costs them the same to make that loan as it does the others. That is why the fees are not increased.

We think this would help in focusing our loan program. We think start-up businesses is really the area that SBA could be the most help. Making a $2 million loan and guaranteeing $750,000, we would certainly wonder why they made that loan with us.

In addition, we certainly have directed our technical assistance programs to the segment of the business community that is the fastest growing—women- and minority-owned businesses. We have opened in the last number of years a number of new Women's Business Centers. We just recently opened one last year in Rhode Island. We have high hopes for all of those.

The Small Business Development Center Program needs to focus itself as well into the areas that are the fastest growing, and we have encouraged that through our request for proposals on SBDCs to ask them to specifically outreach into the minority community and to the veterans community, especially service-connected disabled and also the women's business start-ups.

SCORE AND SMALL BUSINESS DEVELOPMENT CENTERS

Mr. KENNEDY. Well, obviously, I feel a great deal of comfort knowing that someone like Joe, who has been so successful in my State, is now in your office advising on these issues, because he will certainly know from his own experience what makes a difference for our State of Rhode Island.

But I wanted to ask with respect to the fact that the SBA has been a catalyst of the private marketplace. It has been the facilitator in so many areas, not only in funding but also in services and counseling. They help put together, as you know, the senior executives volunteer—retired volunteer program, the SCORE program and others. So all these things are good in terms of helping these small businesses get up and going.

And, as you know, channeling the money is just part of it. You only channel the money into 7(a) once you know that the business is ready to go and whether it meets that seal of approval.

So that will invariably involve a lot of counseling, and that is the unwritten kind of cost. But in your budget it isn't an unwritten cost. It is a written cost. So I wanted to explore with you, and I know this was explored by Mr. Wolf in more general questions about fees, but in the statutory language, you know, you are prohibited from charging for counseling—13 CFR part 130 regulation,

Small Business Development Centers. And you are prohibited from—specialized services fees may not be imposed for counseling.

And section 21 of the Small Business Act, Prohibition of Certain Fees: A Small Business Development Center shall not impose or otherwise collect a fee other than compensation in connection with the provision of counseling services under that section.

That section is very narrow, and I just wanted to see, if you don't think you will meet the $12 million in fees that you are banking on, how are you going to make ends meet?

Mr. WHITMORE. Well, first let me go back to SCORE, which you mentioned. We at SBA and I think the committees should be very proud of SCORE. They have 11,000 volunteers. And recently I have seen a number of stories in the Washington Post.

In Virginia, there was one on how much two SCORE counselors from Washington helped a woman get her business going. Most SCORE chapters vote not even to take the mileage expense. They would rather use it for other things. We propose a $250,000 increase. It helps them with administrative costs.

Going back to the SBDC program, I am really kind of surprised myself how they are so concerned about charging the fees. All SBDCs charge training fees now.

In the State of Rhode Island, they charge a fee for training or precounseling before you can even start counseling. The same amount they charge is what is proposed in the budget. It is required in the State of Rhode Island that if you are a start-up business going to a Small Business Development Center, you have to take a training course at a cost between $35 and $45.

What we have proposed in the budget is a fee of under $11 an hour. The statistics have found that the average business going to SCORE for counseling takes about 5 hours of counseling. Our proposal basically allows them to not charge fees on the first hour but charge fees of $10.75 for the next 4 hours over the course of the year. We certainly don't think that is prohibitive to a small business, especially if they were able to pay the SBDC fee of training before they even started the counseling.

So for the SBDCs to say they are just surprised at this, I am kind of shocked myself. They have been charging training fees for many years. None of the provisions that you cited prohibit them from charging training fees, and each and every SBDC throughout the country does charge that. We are asking them to charge a very moderate fee on counseling. I doubt it would put them in competition with the private sector.

Our Women's Business Centers who deal with very low and moderate income women that want to start up do charge fees, although quite of number of them get scholarships by co-sponsorships with local institutions. So I think it is a very modest proposal. I don't think it would paralyze the SBDCs by any stretch. And most of them are charging fees. We are not asking them to remit them back. We are asking them to keep them and use them in the program they operate.

NEW MARKETS VENTURE CAPITAL PROGRAM

Mr. KENNEDY. Obviously, the proof will be in the pudding. We will see how it all works out. Ideally, it works out the way you an-

ticipate, where it won't be a hinderance to your overall budget goals to ensure that the funds that you do have budgeted to other areas are funds that are there because they are recouped through these fees and the program moves forward.

Obviously, I don't want to—when you are in my position you end up becoming a little bit redundant, because everyone gets to ask your questions that you were going to ask first. So I would just associate myself with the comments of Ms. Roybal-Allard and I know others when it comes to the new e-markets of venture capital. Because that, obviously, is we need to get more capital out and not less. And obviously I know you have ways that you are going to accomplish that same goal through other programs like you said, the 7(a) and other programs.

Mr. WHITMORE. Certainly on the New Market Venture Capital Program it is a 10-year program, and during the course of the entire 10 years we will be evaluating that program to see if it is doing exactly as the Congress intended. If it wasn't, we certainly would ask for modifications. And depending on the success of the program, if it was doing what it was doing, we have ample time to fund that after the 10-year period.

BUSINESS ASSISTANCE TO NATIVE AMERICANS

Mr. KENNEDY. I just again say we really appreciate what the SBA has been doing in our State. We just want it to keep going strong, and I am sure that it will because it enjoyed great popularity. I think that may make a big difference as to why it has been so successful. Success generates success, and that has been the experience.

Finally, let me say, as the co-founder of the Native American Caucus, obviously we need to do a lot in terms of our Native American areas to expand business opportunities to them.

Mr. WHITMORE. Certainly, I think that that is probably the area that is most underrepresented in SBA. We talk about the SBDCs, they have something like 950 subcenters around the country, but I don't think there is one on a Native American reservation. I know that is sad for SBDCs, and it is sad for SBA, and it is certainly not helpful for economic development out there.

We have information centers located on, I believe, 16 American reservations. We are looking at the effectiveness of that. We are not sure that that is doing enough to stimulate economic growth out there.

We think certainly SBDCs are a great tool for Native American reservations. We think within the amount of funding there we should be addressing those issues in the States where there are those reservations and SBA not Bear has successful getting them to do that.

Mr. KENNEDY. Well, my colleagues on a bipartisan basis would be very excited about working with you with the relationships that we have developed already. Because we have certainly heard about the chronic problems of seeking capital and getting the necessary support to get businesses started where there is no governmental bonding authority, if you will, an ability to use the creative powers of financing, you know, our government uses for our constituents

that their governments can use for their people. So I would be excited to work with you on seeing that take place.

Mr. WHITMORE. Okay.

SMALL BUSINESS DEVELOPMENT CENTERS

Mr. WOLF [presiding]. Following up on Mr. Kennedy's question, how many—your request for Small Business Development Centers, how many receive funding from SBA?

Mr. WHITMORE. They all do. Small Business development centers?

Mr. WOLF. How many are there? How many receive?

Mr. WHITMORE. I believe it is over 900 and some odd subcenters.

Mr. WOLF. You want to get the exact number for the record.

[The information follows:]

SBA funds 58 small business development centers and approximately 1,000 subcenters.

Mr. WHITMORE. The funding would come directly to the State lead organization, and they determine how to fund within the State.

Mr. WOLF. Would your program then be a cut of support to each individual center?

Mr. WHITMORE. Yes, it would.

Mr. WOLF. Okay. And with regard to the legislation, have you asked the authorizers?

Mr. WHITMORE. Yes, we have.

Mr. WOLF. And would you submit for the record who you have spoken to?

Mr. WHITMORE. Yes.

Mr. WOLF. How many members of the committee?

Mr. WHITMORE. I don't know that we have talked directly to members, but we certainly have talked to all the staff.

[The information follows:]

I personally briefed the minority and majority staff of the Senate and House authorizing committees on the SBDC as well as our other proposals. I was asked several questions on details of how the fee would be implemented.

Mr. WOLF. You know, again, it is a question of insincerity. I mean, you know, I guess it just proves again, if the legislation is not enacted, what would your appropriation request be to maintain the current program?

Mr. WHITMORE. It would be approximately $12 million more. We are requesting $75.8 million.

Mr. WOLF. If the committee appropriates a level of $75.8 and the legislation is not enacted, what would the impact on the program overall and what would the impact be on the individual centers receiving funding under the program?

Mr. WHITMORE. Mr. Chairman, I would like to submit that for the record.

[The information follows:]

The impact cannot be determined until the FY 2002 budget is enacted.

Mr. WHITMORE. One of the things that would change in all the SBDCs this year is the funding by State because of the change in the population. It is based on a population census formula. So we

have to calculate that change as well as what the fee change would be. It is on a pro rata basis.

DISASTER LOAN PROGRAM

Mr. WOLF. This is my first year on the committee, but I do know in talking to Members that budgeting gimmicks with regard to the disaster loan program have been a source of friction between the SBA and the committee over the years. Do you agree with that?

Mr. WHITMORE. I think in the past it has certainly the case. I think today the budget proposal that has been submitted is not a gimmick. It is in a different plan to fund it under the national emergency reserve. It would be offset against the caps. It is fully funded for a 5-year average, which has not been done in the past.

Mr. WOLF. The committee has insisted in the past that the SBA request enough new regular discretionary budget authority to support an average annual disaster loan program level, and you haven't done that, have you?

Mr. WHITMORE. I believe we have. Between what has been requested directly to your committee and what is being requested as part of the President's National Emergency Fund, SBA's share of that would fully fund the average 5-year disaster program.

Mr. WOLF. That was not in the budget resolution.

Mr. WHITMORE. Please repeat what you said.

Mr. WOLF. That was not in the budget resolution. So it is, in essence, not there.

Mr. WHITMORE. We believe that OMB has indicated that they are still working with the full Appropriations Committee to do that. If it was not, I assume that that full amount would be transferred back to our request.

Mr. WOLF. Let me ask Mr. Serrano if he would like to ask questions.

Mr. KENNEDY. Mr. Chairman, to answer your question about what cut it will be to Rhode Island, the impact of the budget in terms of the Small Business Development Center would be $74,847 just in my Small Business Development Center in Rhode Island. Of course, Rhode Island is a very small State. So you can imagine what it is——

Mr. WOLF. We are talking about the degree of difficulty in making up the shortfalls we have in other areas, that it would have been more appropriate if they aggressively lobbied for the legislation and get it passed, get the approval.

BUDGET REDUCTIONS FROM FISCAL YEAR 2001

Mr. SERRANO. Thank you, Mr. Chairman.

Let me ask you a question. The more time I spend here today, somehow you are painting this rosy picture and you are not convincing me that you actually feel that at the end of this road your agency is going to be treated properly. And, traditionally—I mean, maybe I could turn the tables around, but it can't happen.

Chairman Rogers, Mr. Chairman, would sit here and say, tell me the truth, this was something OMB did to you. You know you really don't want this budget. But in this case we don't know when this budget was submitted, so we can't seem to point a finger at who accepted or invited or asked for this kind of a cut.

So it puts us in a unique situation in that, for me, I seem not to be getting any help from the agency in telling me, help us out; and we are going to be out here sort of on our own to say, what you think is good for you is probably not the way to do business. But if we don't do that, you will be destroyed.

And I just want to, you know, make that point for the record that I am troubled by the fact that I am not hearing, help us, there is a problem here. And you are right, a 40 percent cut is ridiculous. It will kill a lot of programs based——

Mr. WOLF. Maybe could you submit at this point, following his question, the name of your OMB examiner. Put in the record at this point. I will refer——

Mr. WHITMORE. We will submit it for the record.

Mr. WOLF. If you want to tell us, that is fine.

Mr. WHITMORE. Alan Reinsmith is the senior person on our side.

SYSTEMS MODERNIZATION INITIATIVE

Mr. SERRANO. Mr. Whitmore, your prepared testimony makes a reference to the SBA's systems modernization initiative and the loan monitoring system (LMS) that I find troubling. On pages 11 and 12 of the statement, you state that you have concluded that the LMS has become commingled with an "internally sought systems modernization initiative" and that you have ordered that the program be refocused on the activities for which Congress authorized and appropriated the funds. That is a strong statement.

I do not think that is the case. When I review the prior year's budget requests and hearings before this subcommittee, and this committee's reports, it is clear that a systems modernization initiative is exactly what funds were both requested and provided for. So I would like to know what specifically are you asserting in this statement. Do you not agree that the Appropriations Committee clearly stated in the fiscal year 2001 conference report language that the $8 million provided for the current year was for the agency's systems modernization initiative?

Mr. WHITMORE. Mr. Ranking Member, the authorization, a Loan Monitoring System was in the authorizing bill of December 1997. Specifically, I believe the intent of the Congress, concerned with the size of SBA's growing portfolio was to modernize the SBA Loan Monitoring System, and so the following year $8 million was appropriated for lender oversight and lender loan modernization.

Mr. WHITMORE. We have been working towards that end and the Agency testified many times, that we were working and in fact we have testified, I believe the last time, that it would be ready in September.

When I came in in February of this year, the first briefing I had from that particular staff was that they did not think they were going to be able to deliver this system for $40 million but it would be more like $90 million, and they did not think that they could meet a 4-year projection, what they had testified to, but they thought it would be more like 7 years.

So I asked them to look at this very closely. Some of the things that were being done I think were certainly necessary for the agency, but probably not in line with the intent of developing an automated loan monitoring system. We were expanding this system up

quite a bit. It looked like we were developing a proprietary system that would have no end and no real hard cost to it.

In addition, people that debriefed me indicated, at least in the oversight and some of the appropriation areas, that the Congress was still intent on getting a loan monitoring system and was not as interested in a systems modernization effort that went across the SBA entirely. I am not saying that systems modernization may not have been needed, but we felt certainly it didn't meet the intent of the December 1997 authorizing language or even the report language in the appropriations bill.

So what we were asked to do is look specifically to develop a loan monitoring system, because our portfolio has increased significantly in the last 10-years, to have the better handle on where we are and how much risk is in their portfolio. It would be very helpful to us and certainly be helpful in looking at these subsidy rates as well.

Mr. SERRANO. Let me ask you a question. You say that the agency feels it doesn't meet what the authorizing committee had intended or the appropriating committee. Now, when was this decision or this conclusion reached? Was this during the time that we had the other Administrator or after she left?

Mr. WHITMORE. It was in February this year, after she left.

Mr. SERRANO. Okay. So the last time that folks were here from the SBA, they told us what they wanted and we gave them what they wanted. Chairman Rogers was very supportive of it. Then, somewhere between then and getting a permanent new Administrator, some folks decided that this was no good and should be done away with or refocused, which also leads me to another question. If you are refocusing, does that mean you still need the $8 million now for the current fiscal year?

Mr. WHITMORE. I think we still need a loan monitoring system. I mean, we have a large portfolio that I think we need to have better information on. We have checked with commercial institutions, and we feel we can get it without doing a proprietary system that we felt was not controllable either in terms of cost or time.

Mr. SERRANO. Well, you know, I keep telling you, this is a strange situation I find myself in. I am trying to help you guys. I am trying to help you and I am hearing nothing as a request for help. In fact, I am hearing that sometime between the presidential election and the settling in of the next Administration—which is fine by me, I understand what a new President coming in means—but somewhere in between you decided all these good things are no longer any good and I don't know how the decision was made.

Mr. WHITMORE. Certainly, if I can go back on the loan monitoring system, I was very surprised myself. I looked at the testimony. We had testified a number of times that this system would be up and operating. On the Senate side they were trying to set up time frames to come down and review the system when it was fully operational as SBA had testified to would be done by September of this year, and then the first briefing I received said it is no longer at $40 million but it is looking more towards $90 million and was no longer going to be done in 4 years but it was now going to take 7 years.

Next thing I was asked was to concur in a spending letter, and I did not want to send a spending letter to the Congress on how

we spent $8 million when the Congress was under the impression that this was a $40 million system, and my recent briefing talked about $90 million.

Mr. SERRANO. Well, we were told last year that it would be more than $40 million. I mean, we knew what we were doing, and Chairman Rogers knew exactly what he was doing, and what I know he was doing was being very supportive of what you folks wanted to do.

Mr. WHITMORE. Well, I think, you know, everybody supported developing a loan monitoring system.

Mr. SERRANO. Well, we just don't seem to hear it from you guys. Let me for the record just state the following, and I am sorry the chairman is not here, but I will give him a copy.

While we in Congress may be disappointed that the SBA doesn't have a lot to show on the loan monitoring system, this committee under Chairman Rogers' leadership did intend to provide funding for the entire SBA systems initiative. If the new administration wants to revisit these decisions, that is fine, and I mean that sincerely. That is their right, but don't try to insinuate that anyone here on this subcommittee or anyone in the agency for that matter was somehow doing something wrong by going forward with the proposed systems modernization initiative. And that is what I am hearing and, to be honest, I don't like it.

Mr. WHITMORE. I didn't think we intended to insinuate anybody was doing something wrong. I think what we intended to say was that the loan monitoring system that was first authorized was being lost in this entire modernization effort, and we think that the risk to the agency today is in our portfolio in that we need to have better data.

Mr. SERRANO. I don't want to sound like a broken record, but who is we? Who made this decision?

Mr. WHITMORE. I did.

Mr. SERRANO. I mean, what I hear from every other agency is how they can't do something until they have certain things in place. And you guys are revising everything we agreed to with the last Administration without revisiting anything. I mean, if President Bush and a new Administrator come to us, to this committee, to this chairman, says we don't like this, we don't want this, we don't want that, I understand that. I may not like that but I understand it. This is a different situation. This is in between Administrators, someone—and you are saying that was you?

Mr. WHITMORE. Yes.

Mr. SERRANO. Decided to change these things.

Mr. WHITMORE. We decided we should focus on loan monitoring to be the top priority.

Mr. SERRANO. All right. Well, that is not the only thing we had in mind, and I think as we go along we will have to discuss this further.

DISASTER LOAN PROGRAM LEVELS

Mr. WOLF. We will recess, I think again, on this vote for 15 minutes, but you are requesting no new funding for fiscal year 2002 disaster loan subsidies. Based on your most recent carryover esti-

mates, what disaster loan program level will you be able to support with no new appropriation?

Mr. WALTER. The budget proposed a $300 million program level with no new appropriation.

Mr. WOLF. Your funding request for disaster loans also assumes the enactment of an interest rate hike on disaster victims. These loans are a critical piece of Federal assistance for disaster recovery for people who have lost their homes or suffered severe economic injury to their businesses. Your budget assumes accompanying legislation that would increase by 35 percent the interest rate paid on economic injury loans by disaster victims who are unable to obtain credit elsewhere.

Is this a good idea? Is this a good policy decision?

Mr. WHITMORE. Well, I think it is a very slight change in the interest rate today, as we would be from just under 4% to slightly over 5%.

Mr. WOLF. But these are all people who were disaster victims, are they not?

Mr. WHITMORE. Yes, business disaster victims, not homeowners.

Mr. WOLF. Right, but their business is wiped out in many respects?

Mr. WHITMORE. Or damaged, yes, sir.

Mr. WOLF. So is it a good policy or good idea?

Mr. WHITMORE. It is still a very low cost loan at slightly over 5%. The increase would be relatively minor.

Mr. WOLF. Was this proposed before?

Mr. WHITMORE. I believe it was proposed in a broader sense across all disaster loans in the past.

Mr. WOLF. And the authorizing committee agreed to make this change this time out?

Mr. WHITMORE. I don't believe they have agreed to this, no.

Mr. WOLF. Do the people in the executive branch think it is a good idea for a budget——

Mr. WHITMORE. I believe they think it is a good idea.

NATIONAL EMERGENCY RESERVE FUND

Mr. WOLF. Last question. The National Emergency Reserve Fund has not been included in the budget resolution. So assuming, as we said before, no bailout is coming in the form of emergency appropriations, and no congressional action, how much in regular discretionary appropriations would be required to fund a program level of $800 million in fiscal year 2002?

Mr. WHITMORE. For $800 million, it would be approximately $135 million more.

Mr. WOLF. Okay. We are going to recess for three more votes, but they are just 5 minutes. So we should be back at 20 to 25 after.

[Recess.]

NEW FREEDOM INITIATIVE

Mr. WOLF. We will reconvene. You are requesting $5 million for the New Freedom Initiative to provide technical assistance to small businesses on complying with the Americans with Disabilities Act, which was enacted in 1990. Why would you be asking for this assistance now?

Mr. WHITMORE. It was part of the President's New Freedom Initiative, which further enhances the Americans with Disabilities Act. It is a governmentwide initiative of the President. The SBA has a small portion of that. We are part of a task group which I believe is led by the Department of Labor, Secretary Chao. We are working with them right now. Our portion will be to try to assist small businesses in complying with the provisions of the Act to make small businesses more accessible.

Mr. WOLF. Could the Small Business Development Center or Business Information Center or Women's Business Center train to do that?

Mr. WHITMORE. I think, they all could play some part in this, and we intend certainly to have all our assistance centers involved.

TELEWORK

Mr. WOLF. How good are we on telework? How many SBA employees telework?

Mr. WHITMORE. I think we have 138.

Mr. WOLF. Out of how many employees?

Mr. WHITMORE. We have 2,900 in the agency.

Mr. WOLF. And the law calls for 25 percent by the end of the year. That is the law. That is not a recommendation. How are you going to meet that?

Mr. WHITMORE. We have run a pilot in the last few years. We have just recently put together a standard operating procedure to expand the pilot.

Mr. WOLF. Do you have a Web page if somebody wants to get on the Web page?

Mr. WHITMORE. I don't believe it has been put on the Web page, but certainly that is good idea and we will do that.

Mr. WOLF. Go ahead and finish.

Mr. WHITMORE. A lot of our offices around the country are very small and it is difficult for some of the staff to be on telecommuting because they deal with the public so much. But we fully intend——

Mr. WOLF. We are not suggesting they have to do it every day. One out of four.

Mr. WHITMORE. I understand, and we are certainly supportive of telecommuting. We are still struggling though, Mr. Chairman, to do that with alternate work schedules. A large majority of SBA employees are already on——

Mr. WOLF. Fifty-five percent of the AT&T workforce is now doing it.

Mr. WHITMORE. And we are looking at a number of ways——

Mr. WOLF. You have a presumption that the job is a teleworking job unless they prove opposite or do you make them prove that they have a teleworking job before they can do that?

Mr. WHITMORE. I believe SBA has tried to assess the jobs across the agency and which categories would be eligible for telecommuting. We did not do that on the pilot. We allowed anybody that wanted to ask and who could work with their supervisors and the union to get that approved. We think it has been successful, and we certainly are looking to expand that program.

Mr. WOLF. So you are a couple hundred short to meet the 25 percent goal?

Mr. WHITMORE. We would be several hundred short of that goal.

Mr. WOLF. How are you going to meet that? That is the law, 25 percent this year.

Mr. WHITMORE. I may be wrong. I was under the impression that 25 percent of those eligible.

Mr. WOLF. But I will tell you what, if we find that you are defining eligibility narrowly, I will personally take it up with the Administrator himself or I will cut his office. I will do that and stick with it all the way through the bill. Not just for a threat, we will take it to the very end. We will pass it. This is a congestion problem. It is good for morale. It is good for recruitment. It works. The private sector is doing it very, very aggressively and the figure is 25 percent this year, 50 percent next, 75 percent the following year and a 100 percent the fourth year, and the average Federal agency, the assumption is 40 to 60 percent of the people have jobs that enable them to telework, some agencies higher.

Mr. WHITMORE. I understand. We are proposing that almost 2,400 of our 2,900 employees would be eligible for it.

Mr. WOLF. Well, then you will meet it then.

Mr. WHITMORE. We certainly intend to meet it.

DRUG-FREE WORKFORCE PROGRAM

Mr. WOLF. You are requesting $5 million for the Drug-Free Workplace Program, an increase from $3.5 million appropriated in fiscal year 2001. The Congress has provided $11 million for this program over the past 3 years. How do you measure the success or failure of the program and what results have you seen so far?

Mr. WHITMORE. That is an increase actually of $1.5 million over the previous year. I would ask that I be allowed to submit the evaluation on that. I am not familiar with how they have done that.

[The information follows:]

The first full year of the program was completed in September 2000 and SBA now has narrative reports from the 15 intermediaries and 14 SBDCs funded. The reports describe the recipients' accomplishments and give statistics such as: the number of small businesses educated; the number of working parents educated on how to keep their children drug-free; and the number of small businesses that implemented a drug-free workplace program. These reports are one of the performance measurements used to determine success.

Another evaluation tool used by the SBA was site visits. During the first year of the program, SBA and its partner agencies conducted 14 site visits.

SBA and its partner agencies are encouraged by the progress of the recipients and believe this program is filling a vital need in the small business community. During the program's first year, approximately 975 small businesses set up drug-free workplace programs. A consistent comment from these small businesses is that they would not have done this without the financial and technical assistance provided by SBA's Drug-Free Workplace Program. Increasing the appropriations for this program will allow more small businesses to implement drug-free workplace programs.

OPERATING EXPENSE

Mr. WOLF. Sure. Your budget request for operating expenses is $307 million, an increase of $11.1 million over fiscal year 2001, while at the same time you are showing a reduction of 100 full time equivalent staff. Why does it cost $11 million more to pay 100 less people?

Mr. WALTER. Mr. Chairman, the reason for the increase is principally the pay raise that we expect in January next year.

Mr. WOLF. The 3.6 percent or 4.6 percent increase?

Mr. WALTER. The budget was based on 3.6 even though we now realize it could be closer to 4.6. We also are seeing some fairly significant increases in our rent bills being passed on by GSA. With the amount of funds that we had in the budget we felt that the only way we could still accommodate the existing level of activity would be to lose about 100 people, through attrition.

Mr. WOLF. No one will be laid off?

Mr. WALTER. No, we won't lay off. We attrit about 150 to 200 people normally during a fiscal year.

Mr. WOLF. What is your vacancy rate now? How many openings do you have?

Mr. WALTER. We don't have an authorized ceiling to have a vacancy rate, but we do have a number of critical jobs that remain unfilled at the agency.

Mr. WOLF. How many would that be; do you know?

Mr. WHITMORE. It is in the 110 range.

Mr. WOLF. This is a good opportunity with the downturn in the economy to recruit, particularly here in Washington. We had a job fair last Monday, and a lot of very capable people showed up looking for jobs. If you would like, my office could furnish you a list of the companies that were there who had employees who were laid off.

TRANSFERS FROM LOAN ACCOUNTS TO OPERATING EXPENSES

The Congress has included bill language each of the past 2 years placing a limit on the amount of money that can be transferred from disaster loans to the S&E operating expenses absent reprogramming. In the past SBA used a liberal transfer authority to basically create its own operating budget and staffing levels. The committee has found that the bill language limitation gives the Congress the ability to establish solid operating budget and staffing levels, as we do with other agencies. Why are you requesting that the bill language be deleted?

Mr. WALTER. Mr. Chairman, on that particular one, last year as well as in the budget, we did not plan to transfer any more than what has been appropriated. We feel that the limitation is not necessary because there is no intent on the part of the SBA to transfer more than the appropriation.

Mr. WOLF. So in future years you would tell the committee, put it in this year because we are going to do it or don't do it?

Mr. WALTER. There is no limitation. We provide an estimate in the budget, and we would stick with the estimate in the budget unless there is a deviation after appropriation, and then we would come up for a reprogramming.

Mr. WOLF. Mr. Serrano.

PERSONNEL ACTIONS AT SBA

Mr. SERRANO. I have some questions that I will submit for the record. I have just one further question for now.

I know, Mr. Whitmore, that you have made some personnel changes. We were wondering, first of all, why those changes were being made prior to a new Administrator coming in, but just as importantly, if you could tell us what those changes are.

Mr. WHITMORE. We haven't made any permanent changes. We brought in some people to act in some of the positions that have been vacated by the previous administration, for example in the public communications area, in the Office of Field Operations. The President appointed an Acting Chief Counsel during this interim period. In the Government Contracting and Business Development Program, we have asked someone to act in that role as well.

These are all jobs that will be filled by the new Administrator. These people are all on a temporary basis. There have been no permanent changes.

Mr. SERRANO. And these were to fill positions that were vacant or people were replaced?

Mr. WHITMORE. These were all positions that are normally held by political appointees that haven't arrived. After the Administrator is confirmed, he would make permanent selections from political appointees.

Mr. SERRANO. Is it the norm to have the Acting Administrator during the period—can you tell me if in another agency during this transition period the Acting Administrator replaces people?

Mr. WHITMORE. I didn't replace anyone. I didn't transfer anyone. The people that we brought in to be acting took positions that were held by the previous administration's political appointees.

Mr. SERRANO. I understand that. So these people left?

Mr. WHITMORE. They left on January 20th.

[The information follows:]

SBA POSITION CHANGES – Jan 20, 2001- June 15, 2001 (to date)

Name	New Position	Old Position	Status
John Whitmore	Administrator	AA-Hearings/Appeals	Acting
Robert Gangwere	General Counsel	Staff- Gen. Counsel	Acting
Susan Walthall	Chief Counsel-Adv.	Exec. Sec.-Director	Acting
Judith Roussel	AA-Field Operation	District Dir-Chicago	Acting
Karen Hontz	AA-Cong. Leg Affairs	Staff- CLA	Acting
Barbara Manning	AA-Comm. Public Liais.	District- Boston	Acting
James Rivera	AA-EEO	DADA-Disaster	Acting
Dave Kohler (retired)	AA-Hearings/Appeals	Gen. Counsel	Acting
Chris Holleman	AA-Hearings/Appeals	Staff	Acting
Bill Fisher	ADA-Govt. Contracting	Staff-GC/BD	Acting

Mr. SERRANO. All right. I will submit the rest of the questions for the record.

CLOSING REMARKS

Mr. WOLF. Okay. I will submit a couple extra questions, and I thank you very much for your testimony, and I this is difficult for you, but I think it would be healthy in the future if you could be more open about the holes in your budget. I know that must be a way of operating at OMB because they did the same thing on the FAA with the overflight fees. They did the same thing on the Coast Guard, and it does create a problem.

So I think it is better if it is an important program just to say we are going to cut it a little bit or we are going to do better. I understand. It is not directed towards you, but——

Mr. WHITMORE. Well, if I could just add one thing on that.

Mr. WOLF. Sure.

Mr. WHITMORE. We have a number of programs that are zero subsidy, and over the years they were challenged each and every time. The 504 Development Program is zero subsidy. The Surety Bond is zero. The SBIC Debenture Program is at zero subsidy.

I think this has been a trend that SBA has moved towards over the years. We knew it wouldn't be easy, but we thought it was certainly something to take advantage of and look at different opportunities for funding these programs.

The 504 program is continuing to operate fairly well. In fact, they expect a significant growth this year. The Surety Bond Program has continued to operate without a subsidy for a number of years, and certainly we have been told by the SBIC Association that they feel they can go to a zero subsidy as well. So we have tried these in the past, Mr. Chairman.

Mr. WOLF. Sure. I guess that you would want to kind of make an effort and get the White House involved in coming up and talking to Mr. Manzullo and whoever it is over on the Senate side and really making a sincere effort, but obviously we would hope when the bill comes out that it is an honest and open and legitimate bill without playing any games. Sometimes you get to the end, and you don't have a number so you have just got to zero something out with the idea that later on something happens.

My sense is that is not going to be the way this year. It may very well be what actually comes out of the House, and the numbers coming out of the Senate are relatively close, and then you are faced with, you know, what do you cut because there may not be the increase.

I think if the committee were to exceed the budget, based on what I read in the paper, I think the administration will veto the bills, and if that is the case it will come back in here and you are going to be faced with the question of which program do you want to cut. Obviously the small business program is an important program to the economy. Small business is absolutely critical. There is probably more job generation there than the large businesses.

I have no additional questions, and with that the committee is adjourned.

Thank you both.

Questions for the Record
Small Business Administration

Chairman Frank R. Wolf

Current SBA policy is that only those financial institutions that are "open to the (general) public," are eligible to participate in the SBA's 7(a) guaranteed lending program. SBA's policy with respect to approving credit unions is to limit approval to only those with membership "bonds" based on geography, not occupation. In other words, an approved SBA 7(a) credit union would serve a community, not just a single business or group of related businesses. Many if not most credit unions cannot easily convert to community-based charters because they rely on their sponsoring employers for office space, equipment, and volunteers. I am not aware of such an "open to the public" requirement for any of the other federal agencies for which credit unions are approved fiscal agents. No other programs limit participation based on the federal credit union's type of common bond, but instead recognize credit unions as proper fiscal agents for the delivery of the government agency's products and services.

Question 1:
Would the SBA consider publishing a rule clarifying credit unions' exemption from the "open to the public" requirement?

SBA requires that, in order to participate in the 7(a) program, a lender be open to the public. Under this policy, credit unions that have fields of membership where the common bond is geographical are eligible for program participation, while credit unions whose common bond is employer(s), church affiliation, or a similar bond, are not eligible for 7(a) participation. This requirement for open access has been in effect for more than 20 years, and applies to all lenders.

Recently, however, we have engaged in a series of discussions with credit union trade associations that are proposing that SBA eliminate the open access requirement and allow all qualified credit unions, regardless of their field of membership to participate as 7(a) lenders. These groups have argued that credit unions can be valuable partners to SBA in making sure that all small businesses have access to credit. Based, on the requests of these groups, we intend to reexamine our position on this issue after SBA has permanent leadership in place.

Congressman Jose Serrano

NEW MARKETS

AVAILABILITY OF FUNDS

Question 1:
I understand that there are concerns in the community-based venture capital community about the availability of the new markets operational assistance grant funding beyond the

current fiscal year. Could you explain how the process will work for applicants for these funds?

The New Markets Venture Capital program is a multi-year program with an authorization for one-time funding provided in FY 2002. The legislation is fashioned in such a manner that the technical assistance funds must be obligated in FY 2001. However, the funds will actually be disbursed over a 4-5 year period with a debenture period of 10 years.

Applications for designation as a New Markets Venture Capital (NMVC) company or for receipt of technical assistance grants under the NMVC program were required to be submitted to SBA by May 29, 2001. Conditional approvals are expected by July 10, 2001, with notifications to be made by July 12, 2001.

As part of the evaluation process, SBA will consider the likelihood that the proposed NMVC will be able to raise the required private funding within the requisite time frame. The conditional approved applicants must submit evidence that they have raised the required matching grant funds by August 15, 2001, and provide evidence that they have raised required private capital by September 14, 2001. Failure to raise the required funds will result in the conditionally approved applicant not being finally approved.

Question 2:
If these funds have to be obligated by the end of this fiscal year, will the community-based groups be able to raise the entire minimum matching funding level of $6.5 million by September 30?

We recognize that the deadlines that we have to establish may be challenging for some applicants. In our selection process, we will evaluate the likelihood that the conditionally approved applicants will be able to raise the requisite funding.

Question 3:
Given the fact that New Market Venture Capital funds will operate for 10 years, and the statute required SBA to spend its portion of the grant money during the first five years for the program, why is SBA requiring that the venture capital programs spend their privately raised capital in the first five years as well?

Although the NMVC company will operate through a debenture period of 10 years, its "privately raised capital" becomes part of the Operational Assistance grant when the NMVC designates such capital as matching funds to meet the statutorily required match. The grant budget period for SBA's Operational Assistance Grants to NMVCs is 4.75 years, based, in part, upon the Accounts Closing statute, 31 U.S.C. 1553(a). Under this statute, the account from which SBA disburses the federal portion of the grant will close on September 30, 2006 and thereafter, the federal funds will not be available for any purpose. Because the grant funds consist of both federal and matching portions, the privately raised capital is subject to the same OMB Circulars and the same grant budget period as the federal portion of the grant. This allows SBA to better monitor the use of grant funds, including whether an NMVC has met the required match within the period of the grant, and to close out the grant at the end of the budget period.

Question 4:
How do you propose for the New Markets Venture Capital Fund entities continue to provide operational assistance if they no longer have the program funds to do so?

We expect the NMVC companies to be essentially fully invested within the first five years and for that to be the period where the technical assistance will be most needed. NMVC management can use other resources available to it beyond the first five years if they are needed. For example, the management fee paid to the managing company can be used to fund some assistance, and the NMVC can raise supplemental funds.

NEW MARKETS APPLICATION AND EXAMINATION FEE

Question 5:
I understand that the New Markets statute allows SBA to charge a fee for processing applications and for performance evaluations of the NMVC funds. I hear that you have decided to set this fee at $5,000 and charge the entire fee at the initial application stage. Given that many New Markets applicants will be small non-profits that do not have large cash flows, why were these decisions made?

All applicants in the NMVC program must be **newly formed for-profit entities** with $5 million at hand and an additional $1.5 million available for operational assistance. Given the amount of work that goes into processing the applications, SBA believed that the fee does not pose an undue burden for successful applicants. The $5,000 fee represents less than one tenth of one percent of the minimum amount of total capital that must be raised. The fee will be refunded to those applicants not approved.

In comparison, the fee to an SBIC applicant could be between $10,000 to $20,000, depending on the debenture for which the entity has applied.

Question 6:
Are you not concerned that the very groups in low-income areas that this legislation was designed to assist will be prohibited from participating in the program?

No, the program is designed to assist businesses located in low-income areas that have traditionally not had adequate access to the capital necessary to grow their businesses. All applicants selected to participate in the program will be required to invest 80 percent of their funds and make 80 percent of their investments in these areas. Our selection process is designed to ensure that selected applicants have the ability and the networks within these communities to be successful in achieving this objective.

NEW MARKETS DUPLICATION WITH SBIC PROGRAM

As I understand the SBIC program, they do not target smaller enterprises in low-income areas – they invest in the suburbs. SBIC investments are also concerned with the bottom line – profit. But the New Markets program was designed specifically to target communities where the SBIC's don't go, and to provide a social as well as a financial return, an investment in the future of the community.

Question 7:
Your testimony implies that one reason you have not requested FY 2002 funds for new Markets is it is duplicative of the other business investment programs such as the Small Business Investment Company (SBIC) Program. But isn't it true that SBIC's track record demonstrates that there is a vast area of the country, especially low income communities, that do not currently receive SBIC investment dollars?

SBICs invest in businesses they believe will best meet their investment objectives regardless of where the business is located. SBICs make investments in low-income areas and at a very low cost. In Fiscal Year 2000, we estimate SBICs invested nearly one-half billion dollars in low income areas. Because the NMVC was authorized as a pilot program with a one-time authorization, this will allow Congress and the Administration time to evaluate the program.

DRUG-FREE WORKPLACE

Question 8:
One of the few programs in your budget request that receives an increase is the Drug-Free workplace program, which goes from $3.5 million to $5 million in this request. Could you explain for the Committee exactly how the program currently works, what the increase will specifically provide that you are not currently able to do, and why this initiative ranks higher than other recently authorized programs such as PRIME, New Markets and BusinessLINC that are not included in this budget request?

The Paul D. Coverdell Drug-Free Workplace Program is part of the President's government-wide initiative to combat drug abuse. It requires SBA to provide funding to intermediaries (drug testing firms, employee assistance programs (EAP), and hospitals) and to Small Business Development Centers to assist small businesses financially and technically in setting up drug-free workplace programs. Drug-free workplace programs must include a written policy, drug and alcohol abuse prevention training, drug testing, EAP, and continuing education.

Increasing the appropriations for this program to $5 million will allow more small businesses to implement drug-free workplace programs. During the program's first year, SBA could only help approximately 975 small businesses set up drug-free workplace programs.

Alcohol abuse and drug abuse cause many problems for small business owners. These problems may include lost productivity, increased accidents, increased absenteeism, increased insurance

premiums, and thefts. A survey by the Substance Abuse and Mental Health Services Administration revealed the following:

- Drug and alcohol use is nearly twice as prevalent in small businesses than in larger firms because small businesses are less likely to test employees for drug or alcohol use either before or during employment; and
- Employees of larger firms are three times more likely to have access to an employee assistance program (EAP) to help with drug and alcohol-related problems as are those working in small businesses.

NEW FREEDOM INITIATIVE

Question 9:
The budget request includes a new program in FY 2002 as part of the administration's New Freedom initiative: $5 million to help small businesses comply with the Americans with Disabilities Act (ADA). While the goals of the program are worthy, there are not many details in your budget justifications. What specifically are you proposing to do with the $5 million?

The President's New Freedom Initiative is a government-wide effort designed to break down remaining barriers to equality that face Americans with disabilities. Specifically, it is an initiative that will increase access to assistive technologies, expand educational opportunities, increase the ability of Americans to integrate into the workforce and promote increased access into daily community life.

Under general guidelines for the initiative, the SBA will provide technical assistance to help small businesses comply with the Americans with Disabilities Act (ADA), serve more customers with disabilities, take advantage of the Disabled Access Credit and hire more people with disabilities. Specific strategies for implementing the agency's technical assistance efforts are currently being developed. Our efforts will be aligned with other agencies and organizations sharing the President's vision and commitment for breaking down barriers to equality.

Question 10:
Who will run the program, and will additional staff be hired to carry out the program?

The Office of Entrepreneurial Development will administer the program. At this time, the SBA does not anticipate that additional staff will be needed for this project.

Question 11:
How much of the money will go directly to assisting small businesses?

All of the appropriated funding will be used to assist small businesses in complying with the ADA.

Question 12:
Is there a specific authorization for this program, and if not, will the SBA submit proposed legislation to implement the program?

There is no specific statutory authority for this program. The Administration has proposed this initiative for FY 2002. In this proposal, SBA requests $5 million to implement the initiative.

PRIME

Question 13:
The Program for Investment in Micro-Entrepreneurs (PRIME) Program, funded at $15 million in FY 2001, is proposed to be eliminated in your FY 2002 request. This Subcommittee received numerous letters of support from Members of Congress and others urging us to fund this program last year – two years after the original authorization was passed. What steps have been taken to date to implement the program? How can you be so certain the program is duplicative until the program is up and running and you have a chance to evaluate it?

FY 2001 was the first year that money was appropriated for this program. Applications for PRIME's initial round of funding were due to SBA on June 28, 2001. We expect to make initial selections by mid-August and award grants by the end of the Fiscal Year. Applicants will have up to 24 months to carry out their PRIME programming and research.

SBA has a wide array of funded grant programs that provide technical assistance to small businesses. The Microloan program, provides grants enabling intermediaries to provide marketing, management, and technical assistance to individual microborrowers. It also provides funding to non-lending technical assistance providers to help low income individuals start or improve their own business. Microloan intermediaries and non-lending technical assistance providers are the same groups targeted by PRIME grants.

SBA STAFFING

Question 14:
The budget request for SBA salaries and expenses assumes a staffing reduction of 150 FTE (from 2,860 FTE estimated at the end of FY 2001 to 2,710 FTE by the end of FY 2002). Where do you plan to take these reductions?

The level of staffing indicated in our budget is the on-board count of employees anticipated at the end of the fiscal year, not the FTE level. SBA anticipates approximately 200 separations through normal attrition during FY 2002, with 50 hires back into the Agency, for a "net" reduction in staffing of 150.

The separations are rather random, and cross all Agency programs and locations. These reflect the normal separation pattern of the SBA over time. The new hires, however, will be strategic to

meet the priorities of the new Administrator to serve small businesses. These priority positions have not yet been designated, as we are still awaiting the arrival of our new Administrator.

Question 15:
You have stated that these reductions will be achieved through attrition – will these reductions be at SBA headquarters or in your field offices? How will you be able to control where the reductions occur?

We will not be able to control where the reductions initially occur, since the reductions will be driven by voluntary separations and that is controlled by the employee, not the agency. The separations are rather random and they cross all Agency programs and locations. These reflect the normal separation pattern of the SBA over time. The new hires, however, will be strategically made to meet the priorities of the new Administrator to serve small businesses. These priority positions have not yet been designated, as we are still awaiting the arrival of our new Administrator.

Question 16:
Is the agency currently under a hiring freeze?

On January 20, 2001, Andrew H. Card, Jr. Assistant to the President and Chief of Staff informed all federal agencies that no hiring was to be made until the appointment of the department or agency head. On April 23, 2001, Sean O'Keefe, Deputy Director of the Office of Management and Budget informed agencies that the hiring controls were relaxed for four categories: 1) non-supervisory/managerial positions below GS-13 or equivalent, 2) Presidential Management Intern Program, 3) Student Summer Hire Program, and 4) Workforce Recruitment Program for College Students with Disabilities. In addition, we requested and received an exemption from OMB to meet several critical shortages in the areas of Small Business Investment Company licensing and oversight and in our lender oversight and reviews. Since SBA is still operating with an Acting Administrator rather than a Senate-confirmed Administrator, the hiring freeze, as modified by OMB on April 23, 2001 currently remains in effect.

Question 17:
Mr. Whitmore, have you made any significant staffing changes at SBA headquarters since you became Acting Administrator? If so, please describe the changes and your reasons for making them.

In order to ensure that the incoming Administrator has the maximum amount of discretion and flexibility to direct the SBA, I have made no permanent staffing changes since I became Acting Administrator in the first week of February. Some 50 political appointees departed on or before January 20th and we have replaced only 17 of them -- all on temporary appointments. In addition, I have made temporary "acting" appointments to critical positions within the agency, utilizing both career and political appointees, until such time as the new Administrator is confirmed.

The principal staffing assignments that have been made since the end of January have been to temporarily assign SBA staff into senior management positions vacated by the outgoing

Administration. These positions will be filled by political appointees after the arrival of the new Administrator.

Congresswoman Lucille Roybal-Allard

SBA MICROLOAN TECHNICAL ASSISTANCE GRANTS

Typically 25% of a microloan's value is considered necessary for technical assistance. At the end of FY 2000, the outstanding balance of microloans from the SBA to local lending intermediaries was $80.9 million. The budget allocation for new loans in FY 2001 is $27.5 million. SBA expects to lend out the entire FY 2001 allocation to new and existing intermediaries by the end of the current fiscal year. Taking into account loan balances that are paid back to SBA during the year, the aggregate outstanding loan balance to intermediaries will exceed $100 million by the end of this fiscal year.

This outstanding loan balance, in turn, would require SBA to maintain a technical assistance budget of $25 million to support the 25 percent technical assistance grants for outstanding loans to intermediaries. In addition, SBA currently supports 30 Non-Lending Technical Assistance Providers (NTAP's) that receive $125,000 per year, and the SBA would require at least $3.75 million to support these organizations in the coming year.

Finally, an additional $5,000,000 in TA grants would be required to support the $20 million in new loans called for in the President's FY 2002 budget. These three components total $33,750,000, the minimum amount needed to support very modest growth in the program.

However, the President's FY 2002 budget requests a program level of $20 million in technical assistance grants for the microloan program.

Question 1:
Are these figures and assumptions accurate? If not, why not?

As of April 30, 2001, the outstanding balance owed to SBA was approximately $70.7 million. This is because those loans made in 1992 and 1993 are beginning to pay off early. In addition, those lenders that are not performing at an appropriate level are being terminated from the program with their debts being repaid at time of termination. SBA expects that by the end of FY2001, the actual outstanding debt owed to SBA by intermediary lenders will be slightly less than $100 million. Maturing loans will continue to be repaid by intermediaries as new loans are made to new and existing intermediaries in FY2002.

Question 2:
How does the level of technical assistance in your budget request support the activities of the lending intermediaries participating in the program and the small businesses they serve?

In 1996 we determined that the optimal amount of funding for technical assistance fell between 20 to 25% of the debt owed to SBA by an intermediary. We learned that anything below 17.5% was too low, and put the portfolio at risk. And, that anything over 20% allowed for local level enhancements beyond basic support. We made an internal commitment to continue to fund intermediaries at a level of 20% of their outstanding debt. Based on the amount of estimated debt for FY2002, the Administration believes that $20 million will be adequate to meet this commitment.

Question 3:
Doesn't insufficient technical assistance put the local lending intermediaries and ultimately the SBA portfolio at risk?

Insufficient technical assistance does add an element of risk to the Microloan Program portfolio. However, the Administration feels that the level of requested funding will sufficiently support technical assistance activities and ensure the safety of the portfolio.

Question 4:
What evidence do you have that you aren't placing the entire microloan program at risk by underfunding technical assistance?

In 1996 we determined that the optimal amount of funding for technical assistance fell between 20 to 25% of the debt owed to SBA by an intermediary. This decision was made when we evaluated the results of funding below 17.5 % and saw a marked decline in lending activity. In reviewing the history of the program, it was apparent that 20% funding did not produce a negative effect on lender behavior. Consequently, we made an internal commitment to continue to fund intermediaries at a minimum level of 20% of their outstanding debt. Based on the amount of estimated debt for FY2002, the Administration believes that $20 million will be adequate to meet this commitment.

Question 5:
If this budget is approved as submitted, what steps are you prepared to take if you discover that lack of technical assistance is endangering these loans?

The Administration supports the provision of technical assistance, particularly to the level that it mitigates risk to the taxpayer. As such, SBA will continue to support existing intermediaries and manage existing risk as its primary concern.

DISASTER LOAN PROGRAM

According to SBA's own records, the disaster loan program is actually making money for the federal government through the sale of assets.

Question 6:
What's the reasoning behind increasing the interest rate for borrowers who have just suffered tragic losses?

The disaster loan program is highly subsidized due to the below-market interest rates. The budget proposal was made to bring the interest rate for business borrowers with no credit available elsewhere to the cost of funds to the Agency, to eliminate the interest subsidy for these borrowers. There are still other "subsidies" inherent in this program that cover defaults, grace periods, etc. that would continue to be funded through annual appropriations and the running of the program.

Reducing the subsidy of the disaster loans will increase the economic incentive for businesses to undertake pre-disaster activities to reduce risk of loss from natural disasters. Moreover, the Administration is committed to controlling the growing disaster-related expenditures and protecting the interest of the American taxpayers.

Question 7:
What are the average additional costs that will be paid by small businesses using the disaster loan program under the changes proposed in your FY '02 budget?

We have calculated that the proposed interest rate increase to the average disaster business borrower could increase their monthly payment by about $40 per month over the life of the loan. We estimate that the approximate rate change would be from 4% to 5.4%. However, this increased cost could possibly be absorbed with the normal monthly payment through an extension of the loan maturity.

For example, on an average loan of $56,300 with a 15 year term the monthly payment would rise from about $430 to $470 a month, or we could keep the payments at the same level by extending the maturity of the loan.

Question 8:
Why did you single out small businesses who don't have credit available elsewhere for the interest rate increase?

The disaster loan program is not limited to small businesses. Those businesses who do have credit available elsewhere already pay an interest rate that approximates the Treasury rate. The businesses who do not have credit available elsewhere enjoy a substantial government subsidy on the interest rate. This subsidy is captured in the loan subsidy rate and ultimately paid through the appropriations by all taxpayers.

Question 9:
Won't the general disaster fund proposed by the Administration leave SBA, FEMA and USDA competing for disaster funding?

The proposal made by the Administration for a disaster reserve account was not adopted in the budget resolution by the Congress. Therefore, this is no longer an issue for the FY 2002 budget.

While no longer an issue, the proposed fund was designed to fund the needs of all major disaster response agencies.

NEW MARKETS VENTURE CAPITAL (NMVC) PROGRAM

Your testimony states that the SBIC (Small Business Investment Company) program is "implementing incentives to encourage investment in economically distressed areas," and you propose the SBIC program as a substitute for the New Markets Venture Capital (NMVC) Program that you are proposing for no additional funding.

Question 10:
Does the SBIC program have a technical assistance component like the NMVC?

The SBIC program does not have a technical assistance component. The SBICs provide substantial technical assistance to their portfolio companies within the constraints of their available resources.

Question 11:
What percentage of total SBIC investment dollars are made in low-income areas?

Fiscal Year 2000	Number of Financings	Amount of Financing
Total reported:	4,639 (100%)	$5,466,300,000 (100%)
Low & Mod Income Areas:	1,318 (28.4%)	$1,351,759.367 (24.7%)
Low Income Areas*	431 (9.3%)	$ 438,091,652 (8%)

*Approximated from LMI Criteria

Fiscal Year 2001 (6 months- thru March 31, 2001)	Number of Financings	Amount of Financing
Total reported:	2,098 (100%)	$2,183,600,000 (100%)
Low and Mod Income Areas:	533 (25.4%)	$ 432,433,120 (19.8%)
Low Income Areas*	153 (7.3%)	$ 88,517,050 (4.1%)

*Approximated from LMI Criteria

Question 12:
What percentage of total SBIC investments are made in minority-owned businesses?

Fiscal Year 2000 *(as reported- $ in millions)*	*Number of Financings*	*% of total*	*Amount of Financing*	*% of total*
50% or more ownership				
African American	382	8.2%	$ 78.2	1.4%
Hispanic	76	1.6%	$ 30.3	0.5%
Native American	11	0.2%	$ 2.1	0.1%
Asian	473	10.2%	$110.0	1.9%
Total Minority	**942**	**20.2%**	**$220.6**	**3.9%**

Fiscal Year 2001 (6 months) *(as reported- $ in millions)*	*Number of Financings*	*% of total*	*Amount of Financing*	*% of total*
50% or more ownership				
African American	75	3.6%	$ 15.9	0.7%
Hispanic	17	0.8%	$ 6.7	0.3%
Native American	1	0.0%	$ 0.2	0.0%
Asian	152	7.2%	$ 43.5	2.0%
Total Minority	**245**	**11.6%**	**$ 66.3**	**3.0%**

Question 13:
What evidence do you have that SBICs are suddenly going to start investing large amounts in economically distressed areas or in minority-owned businesses?

Although not required to, SBICs already make substantial investments in low-income areas and to women and minority-owned businesses. NMVC companies are also not required to make investments to women or minority-owned companies.

FEDERAL GOVERNMENT SMALL BUSINESS CONTRACTING

The Ranking Democrat of the Small Business Committee, Rep. Nydia Velazquez, conducted a study of 21 federal agencies to evaluate their progress in meeting their small business contracting goals. These 21 federal agencies account for over 96% of federal procurement, but the result was alarming. The study found that from 1997 to 1999, the number of small business federal contracts suffered a 23% decrease. Moreover, these setbacks for small business have disproportionately hurt women- and minority-owned enterprises.

Question 14:
Is SBA familiar with this report, and does SBA agree with the basic findings of the report?

SBA is familiar with the report. SBA differs with some of the methods of analysis and the conclusions in the report. Small business prime contract *dollar* share has remained relatively constant over the past ten years. The *number* of new contracts has dropped significantly. In essence, fewer firms are getting larger federal contracts. The statutory measurement of small business share is dollars and not the number of contracts. The changes in the number of contracts are largely the result of streamlining initiatives contained in the federal acquisition reforms initiated in the1990s.

Question 15:
Does SBA track small business contracting by other federal agencies? If not, why not?

SBA does track small business contracting by other federal agencies through information reported in the Federal Procurement Data System (FPDS) which is maintained by the General Services Administration (GSA). SBA monitors agencies' contracting activities through GSA's annual Federal Procurement Report (FPR). The FPR is the official government source of information about agencies' attainment of their statutory socio-economic federal procurement goals. This report is available at http://www.fpds.gsa.gov/fpds/customer.htm.

Question 16:
Can you explain this significant drop in small business contracts?

Reduction in small business prime contracting opportunities is due to a number of factors. As stated in Question 14 the *number* of new contracts has dropped significantly. In essence, fewer firms are getting larger federal contracts. The statutory measurement of small business share is dollars and not the number of contracts. The changes in the number of contracts are largely the result of streamlining initiatives contained in the federal acquisition reforms initiated in the 1990s. For example, the government's use of credit cards to buy micro-purchases (purchases less than $2500) has dramatically increased from several hundred million dollars in the mid-90's to over $12 billion in FY2000. Prior to acquisition reform, these micro-purchases were reserved for small businesses. In addition, the number of acquisition personnel in the federal government has significantly declined. With fewer contracting officers and changes in buying practices Federal agencies are acquiring needed goods and services with fewer larger (greater than $25,000) contracts.

Question 17:
What steps, if any, is SBA taking to help federal agencies meet their goals?

SBA assists federal agencies meet their goals in a variety of ways. SBA provides contracting officials access to small and disadvantaged sources through its PRO-N*et* database. Small businesses interested in selling to the federal government simply register on the PRO-N*et* database. SBA also has a field staff of Procurement Center Representatives (PCRs) covering the major Federal buying activities. PCRs review agency solicitations to identify small business opportunities and review Agencies' acquisition strategies. In addition, SBA counsels HUBZone firms, small disadvantaged firms, women-owned small businesses, veteran and service-disabled veteran owned small businesses on how to do business with the government. Finally, SBA's

PCRs review the subcontracting plans of large Federal prime contractors to ensure that small firms get a fair share of Federal subcontracts as required by their subcontracting plans.

The new Administration is committed to identifying more efficient and effective ways of assisting agencies meet the challenges posed by the changing Federal contracting environment.

WITNESSES