ELIMINATING WASTE AND MANAGING SPACE IN FEDERAL COURTHOUSES: GAO RECOMMENDATIONS ON COURTHOUSE CONSTRUCTION, COURTROOM SHARING, AND ENFORCING CONGRESSIONALLY AUTHORIZED LIMITS ON SIZE AND COST

(111–115)

HEARING

BEFORE THE

SUBCOMMITTEE ON
ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND
EMERGENCY MANAGEMENT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

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May 24, 2010

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SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Economic Development, Public Buildings, and Emergency Management

FROM: Subcommittee on Economic Development, Public Buildings, and Emergency Management Staff

SUBJECT: Hearing on "Eliminating Waste and Managing Space in Federal Courthouses: GAO Recommendations on Courthouse Construction, Courtroom Sharing, and Enforcing Congressionally Authorized Limits on Size and Cost"

PURPOSE OF THE HEARING

The Subcommittee on Economic Development, Public Buildings, and Emergency Management will meet on Tuesday, May 25, 2010, at 10:00 a.m., in room 2167 of the Rayburn House Office Building to receive testimony from the Administrative Office of the U.S. Courts (AOC), the General Services Administration (GSA), and the Government Accountability Office (GAO) on the draft GAO report, *Better Planning, Oversight, and Courtroom Sharing Needed to Address Future Costs* (GAO-10-417). This hearing is being conducted as one of several hearings that meet the oversight requirements under clauses 2(n), (o), and (p) of Rule XI of the Rules of the U.S. House of Representatives. The panel will provide testimony on the Federal courthouse construction program and provide suggestions for the future management of the program.

BACKGROUND

The Subcommittee has jurisdiction over all of GSA's real property activity through the Property Act of 1949,[1] the Public Buildings Act of 1959 (P.L. 86-249), and the Cooperative Use Act of 1976 (P.L. 94-541), all codified in title 40 of the United States Code. Within GSA, the Public Buildings Service (PBS) is responsible for the construction, repair, maintenance, alteration, and

[1] 40 U.S.C. § 484(k)(3) and (4).

operation of U.S. Courthouses, public buildings, land ports of entry, and general purpose office space for the Federal Government.

On January 24, 2008, the Committee on Transportation and Infrastructure requested that GAO examine courthouse planning and construction, including the initiative's management and costs. In addition, the Committee tasked GAO with reviewing the Federal Judicial Center's (FJC) empirical study of courtroom use to determine the level of courtroom sharing supported by the FJC's data.[2] The purpose of today's hearing is to examine the initial findings of the GAO draft report and give the Judiciary and GSA the opportunity to respond to the findings in the GAO draft report.

The Subcommittee has worked closely with the AOC as well as GSA for almost a decade to develop a courts construction program that adequately meets the needs of the courts and is fiscally sensible. Several courthouse projects in recent history have been delayed by attempts to increase the project scope beyond the authorization, reluctance of the Judiciary to accept cost reduction measures, and cost escalation induced by the long delay from design to construction. The Judiciary has also struggled to pay GSA the rent for the space that it currently occupies. The AOC, in a letter dated December 3, 2004 conveyed a request from the Judicial Conference of the United States that GSA grant the Judiciary a permanent rent exemption of $483 million annually. The Judiciary had been concerned about the increasing share of its budget that must be allocated to rent payments and its impact on court operations. Members of Congress introduced bills in the House and Senate to have rent either waived in part or in whole;[3] none of these bills were enacted.

GAO examined 33 Federal courthouses that have been completed from 2000 to March 2010. GAO obtained and analyzed planning, construction, and budget documents associated with all 33 courthouses. The courthouses examined were geographically diverse as well as of various sizes. GAO determined that the 33 courthouses completed since 2000 include 3.56 million square feet of **extra** space that was a result of:

- Construction of courthouses above the congressionally-approved size;
- An overestimation of the number of judges that courthouses would have; and
- Absence of planning for courtroom sharing.

GAO has concluded that the estimated cost to construct this extra courthouse space is $835 million, and the estimated annual cost to rent, operate, and maintain this extra space is $51 million.[4]

I. Actual Size of U.S. Courthouses vs. Congressionally Authorized Size

Before Congress makes an appropriation, GSA submits to the Committee on Transportation and Infrastructure and the Committee on Environment and Public Works of the Senate detailed project descriptions called prospectuses, for authorization by these Committees when the proposed construction, alteration, or acquisition of a building to be used as a public building exceeds a

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[2] The FJC is the Judiciary's research and educational arm, which conducted an in-depth study involving six months' worth of daily scheduled and actual use for 602 courtrooms in 26 of the nation's 94 Federal district courts.
[3] S. 2292, 109th Congress and H.R. 4710, 109th Congress.
[4] GAO, draft report, *Better Planning, Oversight, and Courtroom Sharing Needed to Address Future Costs*, GAO-10-417 (June 2010). This report is referred to as a draft GAO report throughout this document.

specified threshold. These authorizing resolutions establish limits for square footage, budget, and scope of projects. The draft GAO report states that GSA lacked sufficient controls to ensure that courthouses were built to the congressionally-authorized size, initially because there was no established GSA policy for measuring gross square footage. But even after a measurement policy was established, by 2000, the draft GAO report documents that it was not enforced because all six courthouses completed since 2007 exceeded their congressionally-authorized size.

GAO reports that:

- 27 of the 33 courthouses completed since 2000 exceeded their congressionally-authorized size by a total of 1.7 million square feet;
- 15 of the 33 courthouses exceeded their congressional authorization for square footage by 10 percent; and
- Three courthouses exceeded their authorized square footage by 50 percent.

GAO did case studies on seven of the 33 courthouses and noted that often there was an increase in tenant space as well as other space, such as mechanical spaces and atriums. GAO concludes that GSA's inability to stay within the authorized gross square footage was because GSA relied on the architect to measure and validate whether the courthouses were designed within the authorized gross square footage. GAO reports that GSA did not expect its regional or headquarters officials to monitor or check whether the architect was following GSA's policies. As a result of this lack of oversight, GAO reports that GSA has consistently built courthouses that exceeded the scope of the congressional authorizations.

II. AOC Projections of Additional Judgeships

In September 1993, the GAO issued a report entitled *Federal Judiciary Space: Long-Range Planning Process Needs Revision* (GGD-93-132), GAO questioned the reliability of the Judiciary's caseload projection methods. In the draft GAO report, GAO identified three key problems that impaired the accuracy of the Judiciary's projections of space needs. The Judiciary has consistently over-projected the number of authorized judgeships that Congress would eventually authorize and the number of senior judges to be housed in the new courthouse facilities. The over-projection of the number of judges means the buildings were larger and more costly than necessary. As a result of these over projections, the draft GAO report documents:

- 887,000 extra square feet of extra space due to the over-estimating number of judges the courthouses would have in 10 years;
- 28 of the 33 Courthouses have reached or passed their 10 year planning projection period, while 24 of those 28 courthouses have fewer judges than estimated; and
- The over-estimation of the number of judges constitutes 26 percent of the total judges projected for these courthouses (119 out of a total projected judge population of 461).

There are several challenges in projecting the actual number of judgeships. The underlying issue is that the Judiciary needs Congress to authorize the additional judgeships, which the Judicial Conference recommends. Congress has not consistently approved the requested judgeships and the Judiciary has not adjusted its process in courthouse planning to reflect this uncertainty. Currently, there are bills pending in both the House of Representatives and the Senate to increase the number

of judgeships, but there has been no action on the bills by the respective committees of jurisdiction.[5] The Congressional Research Service (CRS) has also indicated in an empirical study that the number of judgeships recommended by the Judiciary is significantly higher than the number of judges authorized by Congress.[6] Yet another challenge for projecting additional judgeships for specific courthouses is that judgeships are authorized for a district or circuit as a whole, rather than for a specific courthouse. The GAO draft report cites two examples of courthouses overbuilt to accommodate additional judgeships with no assurance that an additional judgeship for that district would be assigned to that particular courthouse. The Judicial Conference also has the additional challenge of predicting when district judges will take senior status, inaccurate caseload projections, and not factoring the amount of time needed to obtain new judgeship authorizations.

Although the AOC has historically used weighted case filings as the basis for requesting additional judgeships, the draft GAO report points out that this higher of level of activity does not translate into higher courtroom usage rates according to the FJC study.

III. Courtroom Sharing Policy of AOC

The third issue addressed by the GAO report is the matter of judges sharing courtrooms. GAO reports that most of the courthouses included in the study have enough courtrooms for all of the district and magistrate judges to have their own courtrooms. Using information made available by the FJC,[7] GAO created a model for courtroom sharing that shows that there are sufficient amounts of unscheduled time in courtrooms for judges to share courtrooms at significantly higher levels than currently are in practice or than are provided for by the Judicial Conference policy.

The Office of Management and Budget (OMB) and Congress have consistently questioned the need for every judge to have a courtroom, particularly in the case of a large courthouse with 20 or more courtrooms. However, the Judiciary has consistently requested a courtroom for every active judge. Recently the Judicial Conference has adopted policies with respect to Senior Judges and Magistrate Judges sharing courtrooms that have partially addressed these issues.[8] However, the draft GAO report shows that there could be significantly more savings. Using information provided by the AOC and FJC, GAO shows that three district judges could share two courtrooms, three senior judges could share one courtroom, and two magistrate judges could share one courtroom all while still providing approximately 20 percent of unused time. GAO used conservative assumptions in making its judicial sharing model, because it considered a courtroom unavailable for use even when it was being used for non-judicial activities and when the scheduled event was cancelled within a week of an event.[9] The FJC study shows that approximately 50 percent of all scheduled events do not take place.

Overall, in its draft report, GAO's analysis of courtroom usage indicates that if sharing had been required in all courthouses constructed since 2000 there would have been significant savings including:

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[5] H.R. 3662, 111th Congress and S. 1653, 111th Congress.

[6] CRS, *Judicial Conference Requests to Congress for Additional Judgeships, 1989 to present* (May 4, 2009).

[7] FJC, *The Use of Courtrooms in U.S. District Courts: A Report to the Judicial Conference Committee on Court Administration & Case Management* (July 18, 2008).

[8] AOC, *Judiciary Approves Free Access to Judges' Workload Reports; Courtroom Sharing for Magistrate Judges* (September 15, 2009).

[9] GAO, in the draft GAO report, included times used for public tours, law school moot courts, local bar associations, and other civic organization activities.

- 946,000 extra square feet was constructed because of judges not sharing courtrooms;
- The number of courtrooms needed in 27 of the 33 district courthouses would have been reduced by a total of 126, if appropriate courtroom sharing had been utilized;
- 40 percent of the total number of district and magistrate courtrooms constructed would not have been needed if the GAO sharing formulas has been followed.

PRIOR LEGISLATIVE AND OVERSIGHT ACTIVITY

On June 21, 2005, the Subcommittee on Economic Development, Public Buildings, and Emergency Management held a hearing entitled, "The Judiciary's Ability to Pay for Current and Future Space Needs".

On June 22, 2006, the Subcommittee held a hearing entitled "The Future of the Federal Courthouse Program: Results of a Government Accountability Office Study on the Judiciary's Rental Obligation".

In the 111th Congress, the Committee on Transportation and Infrastructure has approved four resolutions for courthouses, and amended an earlier resolution for a fifth courthouse. For the first time, the Committee has specified the number of courtrooms for each building, both to ensure courtroom sharing in accordance with new Judicial Conference-approved sharing policies for senior district judges and magistrate judges, and to ensure that the courthouses would not be built with courtrooms for judgeships that had not yet been authorized. These actions, in part, anticipated the problems that the draft GAO report documents.

WITNESSES

PANEL I

The Honorable Bob Peck
Public Building Service, Commissioner
U.S. General Services Administration

Judge Michael A. Ponsor
Chairman, Committee on Space and Facilities
Judicial Conference of the United States

Judge Julie A. Robinson
Chair, Committee on Court Administration and
Case Management

Mr. Mark Goldstein
Director, Physical Infrastructure
Government Accountability Office

ELIMINATING WASTE AND MANAGING SPACE IN FEDERAL COURTHOUSES: GAO RECOMMENDATIONS ON COURTHOUSE CONSTRUCTION, COURTROOM SHARING, AND ENFORCING CONGRESSIONALLY AUTHORIZED LIMITS ON SIZE AND COST

Tuesday, May 24, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS AND EMERGENCY MANAGEMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:02 a.m., in room 2167, Rayburn House Office Building, Hon. Eleanor Holmes Norton [Chairman of the Subcommittee] presiding.

Ms. NORTON. Good morning. And welcome to today's hearing on the Government Accounting Office's draft report entitled Eliminating Waste and Managing Space in Federal Courthouses, GAO Recommendations on Courthouse Construction, Courtroom Sharing, and Enforcing Congressionally Authorized Limits on Size and Cost.

We are pleased to have two Federal judges with us this morning, the Honorable Michael Ponsor, chair of the Judicial Conference Committee on Space and Facilities, and the Honorable Julie Robinson, chair of the Judicial Conferences Court Administration and Case Management Committee, as well as the Honorable Robert Peck, commissioner of the GSA Public Building Service, and Mark Goldstein, GAO director of physical infrastructure.

Today's hearing is one of several hearings that meet the oversight requirements under clause 2(n), (o), and(p) of rule 11 of the Rules of the House of Representatives, which requires each Subcommittee to have at least one hearing annually dedicated to providing oversight on waste, fraud, and abuse.

We convene this morning primarily to hear from GAO regarding a January 24, 2008, bipartisan request from the Committee on Transportation and Infrastructure that the GAO examine courthouse planning and construction, including courthouse construction, management, and cost.

The draft GAO report contains astonishing and serious findings about how the courthouse program has been managed and the amount of money that has been wasted. GAO determined that the 33 courthouses completed by GSA since 2000 include 3.56 million

square feet of extra space, consisting of space that was constructed above the congressionally-approved size, with no notice to this Committee or Subcommittee; consistent overestimation of the number of judges that courthouses would be required to accommodate; and, failure to implement courtroom sharing, despite the mandate of the Committee.

The total value of the unneeded extra space is $835 million in construction costs and $51 million in annual costs in rent and operating expenses, according to GAO. The amount of money that GAO reports was wasted in overbuilding alone demands address by Congress, because GAO has calculated that it is equivalent to the cost of nine additional mid-sized courthouses.

As the Nation is emerging from the greatest economic crisis of our generation with unemployment at 9.9 percent and a growing $12 trillion deficit, it is imperative that waste in Federal spending be eliminated. The American taxpayer has no stomach for such waste when services are being cut in Federal programs and others are being scaled down or eliminated across the entire country. Yet, criticism of a Federal construction program is neither new nor misunderstood.

As far back as 15 years ago, this Committee asked the Judicial Conference of the United States to address the issue of cost containment. The hesitance in decision and absence of resolve led to the draft GAO report we are considering today.

The report cites three principal forms of waste in the Federal courthouse construction program. The construction of 1.7 million square feet—that is 1.7 million square feet—in excess of congressional authorization. Of that number, construction of 887,000 extra square feet was caused by overestimating the number of judges the courthouse would have in 10 years, and the construction of 946,000 square feet because of lack of sharing in courthouses across the country.

Remarkably, a report prepared in 1996 by the Administrative Office of the U.S. Courts, at the direction of the Judicial Conference, entitled, "Space Management Initiative in the Federal Courts", asked the judiciary to begin a process of sharing. A segment of the report of the Administrative Office of the U.S. Courts bears hearing. And I am quoting.

"Courtroom Sharing. The Congress has asked the Judiciary to consider sharing courtrooms, and to determine the impact on a judge's ability to try cases if courtroom sharing were implemented. The Court Administration and Case Management Committee, working in conjunction with other appropriate committees, should be tasked by the conference to determine what policy on courtroom sharing for active and senior judges should be adopted, and whether the impact of any delays that would result from sharing courthouses will adversely affect case processing."

This was the same conversation we were having with GSA and the AOUSC 4 years ago. However, only in the last 2 years has the Judicial Conference agreed to a very modest courtroom sharing policy for senior and magistrate judges. Consequently, today there are empty courtrooms across the country because of resistance to the congressional directive to share courtrooms whenever possible.

GAO's report states that the Judicial Conference also has consistently overprojected the number of judgeships and the number of senior judges that would be appointed 10 years from the point of courthouse design. For 28 of the 33 courthouses the GAO studied, at least 10 years have lapsed since design. Of these 28 courthouses, 23 had extra courtrooms and auxiliary space associated with empty courtrooms, space such as jury deliberation rooms, attorney conference rooms, holding cells, et cetera.

For at least two of these courthouses, the number of judges required to be housed was overestimated by 10. Because approval of new Article 3 judgeships and judge appointments relies on a political process, we certainly can appreciate the difficulty in making accurate predictions. However, with overestimations of 887,000 square feet of wasted courthouse area, the Committee intends to require the necessary expertise to account for probable growth with sufficient accuracy to assure sound fiscal stewardship of the government's resources.

The Judicial Conference appears to have taken leadership of a major GSA construction program, rendering the public building service of the GSA all but a nominal partner in the management of the program.

With 3.56 million square feet of wasted space, GSA is responsible for 1.7 million square feet of the overbuilt space, nearly half of the total because the Public Building Service provided poor oversight of the design and construction process.

This Committee, in deliberate and careful review, examined each prospectus submitted by GSA and made an affirmative decision to authorize each of these courthouses by resolution at a certain square footage. Yet GSA exceeded the limits of the Committee resolutions in 27 of the 33 courthouses completed since 2000. In the case of the O'Connor Courthouse in Phoenix, Arizona, and the Arnold Courthouse Annex in Little Rock, Arkansas, GSA overbuilt the courthouses by over 50 percent, creating several hundred thousand square feet of wasted space.

For some time now, GSA has considered not only the courts, but Federal agencies to be GSA's coustomers rather than the American taxpayer. Time and again, over the past decade, the Agency has allowed the courts and Federal agencies to redesign, reassign, and rethink space decisions with apparently no thought of the financial considerations. The number of amended resolutions has grown steadily, as has the cost of the court program.

Twice in the last 6 years, this Subcommittee has heard testimony regarding the judiciary's inability to pay for its future and current space needs and the problems of the courthouse construction program. Today, the draft report from GAO finds that the Federal courthouse construction program has been undisciplined and out of the control of the GSA, the Agency charged by statute with administration of the program. Not the courts, it is the GSA that is charged by statute of the Congress of the United States with administration of this program.

In the 2005 hearing, the judiciary as well as the GSA, committed to a series of actions each entity would undertake to control the court's runaway rental costs. The Committee did its part by asking the GAO to review how the courts budget for rent, how GSA ac-

counts for rents, and what impact the court's rent relief request of nearly $500 million would have on the Federal building fund. GAO's review came in a June 2006 report on courthouse rent increases and mismanagement, and contained findings of multiple instances of unused or underutilized courtrooms, chambers and support spaces, that there is no criteria in the design guide to assign space to appeals courts, even after 15 years of the Committee requesting such criteria, and that judges have exclusive access to facilities in multiple buildings.

In March 2004, the courts essentially imposed a 2-year moratorium on courthouse construction because of the escalating rental costs. Also in 2005, the Judiciary Space and Facilities Committee committed to reviewing the space standards of the U.S. Court's Design Guide with "emphasis on controlling costs." First, the Space and Facilities Committee began a revamping of its long-range facilities planning process to include "examining staff and judgeship growth as well as the space standard use for estimating square footage needs."

Although GSA knew that the judiciary had difficulty paying its rent bills, GAO reports that GSA overbuilt 9 of the 33 courthouses after the 2006 hearing. At least three courthouses were more than 25 percent over the congressionally authorized limit without any notification to this Subcommittee even after we made certain that both the AOUSC and GSA knew that we were deeply concerned about the issue of space saving and adherence to the Committee's direction on cost containment.

In effect, GSA to some measure, turned a deaf ear not only to this Committee's concerns, but also to the judiciary's concerns about the inordinate rent costs associated with new courthouses. GSA ran up the tab with overbuilding, apparently oblivious of any hardship this might create for the judiciary in funding its burgeoning rent obligation to GSA.

Moreover, several of the courthouse prospectus requests submitted since that hearing still do not include courtroom sharing on the scale that this Subcommittee has consistently required. In surprising disregard of the Committee's mandates, nearly every courthouse has continued to have a one to one ratio of judges to courtrooms. The prospectus requests do not reflect the level of sharing that GAO now finds has been more than possible using the judiciary's own data produced by the Federal Judicial Center.

It is fair to ask where GSA has been throughout this process, why did the GSA not notify the authorizers that these problems were continuing even after our hearings when the judiciary continued to submit projects that were inconsistent with our direction.

The conclusion is unavoidable: That little if any progress has been made in controlling costs or managing the Federal courthouse construction program after a decade of scrutiny. This Subcommittee will withhold authorizing any new additions to the court's inventory until we are convinced that the Federal courthouse construction program is satisfactorily reformed. There will be courthouse sharing where it is appropriate and every courthouse on the court's 5-year courthouse project plan will be reconsidered under new sharing guidelines.

We do not plan to authorize any new courthouses without details on real savings and programs to control spending. We will need a list from GSA of all court projects that are currently appropriated and designed so they can be evaluated to ensure that they do not include the type of waste identified by the GAO in its draft report.

This Subcommittee has a long history of bipartisan and actually nonpartisan action, particularly when it comes to the courts. Today, we will hear from all of the parties, and in collaboration with them, we will begin a process of problem-solving reform of a major Federal program. We intend to work with the GSA and the courts to ensure good management decisions on behalf of the American taxpayer. Legislation will be necessary, and we look forward to working with the minority towards a bipartisan solution to ensure significant savings for taxpayers.

We appreciate the testimony of each of our witnesses today, and we welcome your thoughts and suggestions.

It is now my pleasure to ask our Ranking Member if he has an opening statement.

Mr. DIAZ-BALART. Thank you very much, Madam Chairwoman. I could almost repeat what you have just said. You mentioned, among the things that you talked about, the fact that this Committee works in an nonpartisan way. And it is true, very few Committees work the way this one does. And it is because, frankly, the leadership of the Committee. It has been that way regardless of who is in control, and it remains that way with you as Chairwoman and with Mr. Oberstar as Chair of the Full Committee.

This is one area where we absolutely speak with one voice. I want to thank you for holding this hearing. This is a key hearing, and I know one that you have been talking about for a long time, and we have just never had all of the right information until now. Now we have it. For almost two decades, this Committee has been one of the few voices talking about this issue. We have argued for smaller courthouses and for courtroom sharing and for stronger GSA management of the program. And again, we suspected that courthouses were overbuilt, but we didn't have the actual data.

Today the Government Accountability Office is going to present its review of every courthouse constructed in the last decade. Findings of government waste and mismanagement and disregard for the congressional authority and authorization process are, frankly, unacceptable and appalling.

First and foremost, there appears to be a complete and absolute breakdown in the management and oversight of the courthouse planning and construction. And as a result, GSA built, as the Chairwoman said, 3.5 million square feet of courthouses costing over $800 million, almost a billion dollars which we just don't need and should never have been built.

Let's put that in perspective. That is as if we built three House office buildings, including the one that we are in, three of them, and left them empty. Think of that concept when you are walking through this building and you see the size and scope of this building. Think of three of these buildings empty. That is what we have built using taxpayer money, precious taxpayer money. It is totally unacceptable.

According to the GAO, the three main factors the Chairwoman already talked about: construction of courthouses that exceeded authorized size; the overinflated projections for future judges; and the lack of courtroom sharing.

I was just reminded a little while ago that this Committee has six Subcommittees. I don't believe we have six meeting rooms. We share the meeting rooms. I know a lot of people will argue that Congress is necessarily the most efficient institution on the planet. However, that illustration alone will tell you how problematic this overbuilding of courthouses has been because they do not share. Even Congress shares, but courthouses do not.

Again, the GAO reviewed 33 courthouses since 2000 and found 28 exceeded their authorized size limit. To add insult to injury, GSA officials responsible for the construction of several of the courthouses didn't know they were overbuilt until the GAO mentioned it to them.

I think I need to repeat. Again: GSA officials responsible for the construction of several courthouses did not know they were overbuilt—these are the people responsible for them—until GAO told them. That is what my understanding is, and I hope to hear about that.

Again, on top of this mismanagement, the courts continued to base their space decisions on projections that have been shown to be flawed, to be unreliable.

Another 887,000 square feet of unneeded space was built because U.S. court models for projections projecting the numbers of future judges were overestimated by 35 percent. We are not talking about a small margin of error here, we are talking about huge percentages: 35 percent. For example, in 1995, the Long Island, New York, courthouse had 14 judges and the courts estimated 25 judges by 2005. After building a brand new courthouse, there are now only 15 judges at the courthouse, one more than was previously there.

Today the courts continue to base their space decisions on those bad projections despite nearly two decades of experience that have shown us those are wrong assumptions and failed experiences. More space and money could have been saved had the courts instituted a courtroom-sharing policy. I mentioned that a little while ago. The Chairwoman has mentioned that, and I want to reiterate what she said.

A sharing model developed by the GAO clearly indicates that sharing could have reduced the number of courtrooms by about 40 percent. 40 percent. Or 950,000 square feet of space. Those are serious increases of space that taxpayers should not have to pay for. These estimates are based on the court's own data of courtroom usage, including cancelled events and nonjudicial ceremonial uses.

We hold the trust for the American people, and it seems that trust has been broken.

Courthouses have been built way too big for way too long and for more money than ever needed, and that is the taxpayer's money. They have the right to expect that their money is being used efficiently and effectively. Here is a case where we can demonstrate that has not been the case. This Committee has been mentioning that for a long, long time. We have been stonewalled, but now we have the information that proves it. It is clearly appropriate that

the judiciary have the appropriate space to carry out its constitutional functions, and we all support that, we must ensure that we are good stewards of taxpayer dollars and we are not just throwing money away for no good reason.

I hope today we can hearing from the witnesses to examine those issues more closely. I also hope that the Committee will use this information that we have gathered today to better inform our decisions on current and future courthouse authorizations. Again, this Committee has been mentioning this for a long time. We have the data, and I want to thank, once again, the Chairwoman not only for the hearing we are having today, but also for Chairwoman's steadfast leadership on this issue.

This is not new for you, you have been talking about this for a long time. You have been right, the Committee has been right, and the data is there to prove it and now we need to take it to its next logical conclusion. I thank you for the hearing, and I want to thank the witnesses for being here today.

Ms. NORTON. Thank you very much, Mr. Diaz-Balart.

TESTIMONIES OF MARK GOLDSTEIN, DIRECTOR, PHYSICAL INFRASTRUCTURE, GOVERNMENT ACCOUNTABILITY OFFICE; HON. BOB PECK, PUBLIC BUILDING SERVICE, COMMISSIONER, U.S. GENERAL SERVICES ADMINISTRATION; JUDGE MICHAEL A. PONSOR, CHAIRMAN, COMMITTEE ON SPACE AND FACILITIES, JUDICIAL CONFERENCE OF THE UNITED STATES; AND JUDGE JULIE A. ROBINSON, CHAIR, COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, JUDICIAL CONFERENCE OF THE UNITED STATES

Ms. NORTON. Let us begin with Mark Goldstein, director, physical infrastructure, Government Accountability Office.

Mr. GOLDSTEIN. Thank you, Chairwoman Norton, and Members of the Subcommittee. Thank for the opportunity to appear before the Subcommittee this morning to discuss Federal courthouse construction. The Federal judiciary and the GSA are in the midst of a multi-billion-dollar courthouse construction initiative which began in the early 1990's, and has since faced rising construction costs.

As requested by this Subcommittee, for 33 Federal courthouses completed since 2000, GAO examined: (1) whether they contained extra space and any costs related to it; (2) how their actual size compares with the congressionally authorized size; (3) how their space based on the judiciary's 10-year estimates of judges compares with the actual number of judges; (4) whether the level of courthouse sharing supported by the judiciary's data could have changed the amount of space needed in these courthouses.

GAO analyzed courthouse planning and use data, visited courthouses and modeled courtroom sharing scenarios and interview judges, GSA officials, and other experts. The findings in this testimony are preliminary because the Federal judiciary and GSA are still in the process of commenting on GAO's draft report and did not provide comments on this testimony.

Our preliminary findings in this report are as follows: First, the 33 Federal courthouses completed since 2000 include 3.56 million square feet of extra space; 28 percent of the total, 12.76 million

square feet constructed. The excess square footage consists of space that was constructed above the congressionally authorized size due to overestimating the number of judges the courthouses would have, and without planning for courtroom sharing among judges.

Overall, this space represents about nine average size courthouses. The estimated cost to construct this extra space when adjusted to 2010 dollars is $835 million approximately, and the annual cost to rent, operate and maintain it is approximately $51 million a year.

Second, GAO found that 27 of the 33 courthouses exceeded their congressionally authorized size by approximately 1.7 million square feet; 15 exceeded their congressionally authorized size by more than 10 percent; and 12 of these 15 also had total project costs that exceeded the estimates provided to congressional committees, eight by less than 10 percent and four by 10 to 21 percent.

There is no requirement to notify congressional committees about size overages, as is required for cost overages more than 10 percent. A lack of oversight by GSA, including a lack of focus on not exceeding the congressionally authorized size contributed to these overages.

Our third finding is that the judiciary overestimated the number of judges that would be located in 23 of the 28 courthouses whose space planning occurred at least 10 years ago, causing them to be larger and costlier than necessary. Overall, the judiciary has 119 or approximately 26 percent fewer judges than the 461 it estimated it would have. This leaves the 23 courthouses with extra courtrooms and chamber suites that together total approximate 887,000 square feet.

A variety of factors contributed to the judiciary's overestimates, including inaccurate caseload projections and long-standing difficulties in obtaining new authorizations and filling vacancies. However, the degree to which inaccurate caseloads projections contributed to inaccurate judge estimates cannot be measured because the judiciary did not retain the historic caseload projections used in planning the courthouses.

Finally, using the judiciary's data, GAO designed a model for courthouse sharing which shows that there is enough unscheduled time for substantial courtroom sharing. Sharing could have reduced the number of courtrooms needed in courthouses built since 2000 by 126 courtrooms, about 40 percent of the total, covering about 946,000 square feet. Some judges GAO consulted raised potential challenges to courtroom sharing, such as uncertainty about courtroom availability. But other judges indicated they overcame these challenges, when necessary, and no trials were postponed.

The judiciary has adopted policies for future sharing for senior magistrate judges; but GAO's analysis shows additional sharing opportunities are available. For example, GAO's courtroom sharing model shows that there is sufficient unscheduled time for three district judges to share two courtrooms and for three senior judges to share one courtroom. GAO has developed draft recommendations related to GSA's oversight of construction projects ask the judiciary's planning and sharing of courtrooms that we will finalize in our forthcoming report after fully considering agency comments.

That concludes my statement. I would be happy to take any questions that the Committee may have.

Ms. NORTON. Thank you, Mr. Goldstein.

Our next witness if Robert Peck, Public Building Service commissioner of the GSA.

Mr. PECK. Madame Chair Norton, Ranking Member Diaz-Balart and Members of the Subcommittee, thank you for inviting me today to discuss GSA's Federal courthouse construction program.

The Federal courts play a critical role in the constitutional framework of American democracy. Local, State and Federal courthouses are a traditional landmark dating back to the founding of the Nation. As a steward of federally own buildings, GSA is proud to build courthouses worthy of that role. Federal courthouses must maintain the judiciary's mission of ensuring fair and impartial administration of justice for all Americans, while providing security for judges, jurors and others engaged in the judicial process.

I want to thank you and the Members of this Committee and the Congress for the authorization and funding we have been given to construct this inventory. GSA has serious concerns with this draft GAO report, and takes exception to much of its methodology and conclusions. We welcome the opportunity to clarify and correct the misinformation presented in the report.

One, GAO has used a space measure that assumes upper space in building atriums and courtrooms is included in the gross square footage of an asset when it is typically not.

Two, GAO compounded this erroneous assumption by mistakenly ascribing normal operating and construction costs to these empty volumes.

Three, GAO retroactively applies a methodology of courtroom sharing to buildings designed in some cases more than a decade ago, and then claims that the buildings thus previously designed and built somehow violate this retroactive standard.

Most egregiously, one reading of the GAO report might assume that GSA has willfully neglected congressional direction in the courthouse program. On the contrary, GSA has conscientiously sought and followed regular congressional authorizations and appropriations, and has been subject to strict congressional oversight of the program. We built only courtrooms requested by the judiciary and authorized by the Congress. GSA has been forthright and transparent in our documents, testimony, and briefings to Congress.

GAO also discusses overestimating judgeship projections in this report. GSA agrees this issue warrants further review since these projections have been off the mark in the past. This is a complicated issue, and we believe that GSA, the judiciary, and the Congress should discuss a realistic approach for the future.

GSA has concerns over the data in this report, as I noted, and we dispute many of the findings. To be a little more precise, when calculating the amount of extra space constructed in courthouses, GAO counted the square feet in the building, including tenant floor cuts and vertical floor penetrations in multi-story atriums and double-height courtrooms that are in reality phantom floors. We have included a diagram on page 6 of the written statement that show graphically how this works.

GAO uses phantom square footage to calculate additional costs supposedly incurred to complete the building. GAO divided the total cost of the facility by the building's gross square footage, multiplied it by the alleged amount of additional space GSA constructed to determine the cost of the alleged overbuilt space. These assertions and calculations are inaccurate and grossly misleading. Costs for vertical space are not the same as typical building or office space. The cost of constructing, maintaining and operating this type of space is significantly less compared to the rest of the facility, not the glaring cost exaggeration in the GAO report.

For example, the O'Connor courthouse in Phoenix referenced in the GAO report has an atrium that is not air conditioned. So to assume these operating costs are the same as the space inside other occupied parts of the building is inaccurate. GAO also suggests that cost overruns were the direct result of constructing additional space. These increases were actually primarily due to unprecedented increases in construction costs which escalated by 58 percent during GAO's review period.

Additionally, during the period covered by the audit, the U.S. was attacked by terrorists which resulted in increased costs for enhanced security.

In fact, only four of the 33 courthouses focused on by GAO were over 10 percent of their cost authorizations and appropriations. For the 33 as a whole, final costs were 8.8 percent over the original appropriated amounts which confirms that in fact the gross overbuilding that GAO alleges did not occur.

GAO asserts that 27 out of the 33 Federal courthouses built since 2000 are larger than authorized by Congress. GSA disagrees with GAO's claims since 50 percent of this square footage is due to this atrium and tenant cut space that I have noted. GSA bases our measuring standards on private industry standards. If GAO applied that current private industry standard, the atriums in all 33 products audited would be excluded from the calculation, as I said, resulting in over a 50 percent decrease in square footage. Reasons for the remaining 50 percent of the alleged 1.7 million square feet can be attributed to site limitations, which requires us to alter a design from the initial very conceptual design presented in prospectus authorizations and constructing connections for annexes and some of the space and connections resulting therefrom, and new requirements including new design energy and security standards.

GAO suggests that GSA should notify congressional authorizing and appropriation committees if the size of a courthouse exceeds the congressionally authorized gross square footage. We will notify the appropriate congressional committees when the square footage increase exceeds 10 percent. We always ensure our projects stay within the statutory 10 percent of the appropriated and authorized amounts of dollars; or we notify Congress accordingly and apply for either escalation or reprogramming authority. We have multiple levels of management and system controls to ensure costs do not exceed this threshold.

GSA often has pressing and logical reasons to exceed the original gross square footage. For example, during design, architects can develop more energy-efficient methods, including creating atriums

and light wells to bring natural light into interior, windowless space within the building that could increase the building's square footage, but in the long run, reduce energy costs. GSA will ensure that Congress is notified of these increases in the future, as I said, along with the reasons for the increases.

In estimating the cost for this additional space, GAO applies current GSA space measurement policy retroactively in its analysis. Although GSA adopted the American National Standards Institute and Building Owners and Managers Association measurements standards in 1997, GSA did not establish formal national guidance to include atrium space in the gross area calculation until fiscal year 2005. The 33 courthouse projects under review by GAO were authorized prior to this policy.

So in other words, some of the confusion about measurement is as a result of our having brought in one measurement standard when we did the prospectuses, and another one later when we actually measured the space and then did include the atrium, the empty atrium and courtroom volumetric space in our calculations.

GAO also asserts that GSA needs additional oversight and controls over the management of our program. We already have policies that require central office of GSA and the regions during the design process to approve facility measurements and ensure they are in line with the appropriation and authorization. Additionally, we have measurement experts who provide an independent evaluation of the design. Compliance with the prospectus building size is necessary to proceed with a project, and GSA will continue to educate our project teams on these policies and ensure our measurement experts are involved throughout the project phases.

We work closely with the judiciary to develop their courthouse requirements. The judiciary has developed and implemented policies that require courtrooms to be shared among certain classes of judges. We commend the courts for developing these new courtroom sharing models which were developed in recent years.

GAO audited courthouses that were designed, and in some cases, built before the judiciary and GSA implemented these newer sharing models. It is important to note that this sharing requires one courtroom for every two senior judges, and one courtroom for every two magistrate judges. The judiciary and GSA also implemented additional sharing policies for American Recovery and Reinvestment Act projects of no more than one courtroom for every two senior district judges who are up to 10 years in advance of their senior eligibility date.

It is important to note that GAO's findings were based on projects designed before these sharing models were implemented. We in the judiciary are committed to these courtroom sharing policy for new courthouse projects with future plan designs.

This concludes my testimony. I appreciate the opportunity to discuss the draft report and clarify the assumptions and statements made in it. Thank you for inviting me to appear. I am happy to answer your questions.

Ms. NORTON. Thank you, Mr. Peck.

Ms. NORTON. We will hear next from Judge Michael Ponsor, chairman of the committee on space and facilities of the Judicial Conference of the United States.

Judge PONSOR. Thank you, and good morning, Madam Chair and Members of the Subcommittee. I am Michael A. Ponsor. I am a United States District Court Judge for the district of Massachusetts western division. Since last October, I have served as chair of the Judicial Conference Committee on Space and Facilities, and I am very honored to be appearing before you for the first time today in that capacity.

Before my brief remarks, I do want to take the opportunity to thank the Subcommittee for its support of the judiciary's courthouse construction program. I have special reason to express my gratitude since my community has benefited from this Subcommittee's assistance and oversight in the form of Springfield's new much-needed courthouse which opened in October 2008 and which I work in every day.

I will be commenting on the GAO report, and I have two points to make in my brief time: the first to praise; and the second to demur.

First of all, the six recommendations offered at pages 47 and 48 of the GAO report are, in my opinion, sensible and helpful. I welcome them. I believe they will mesh comfortably with the efforts that the judiciary is making in this area, and I look forward to working with this Subcommittee toward their implementation. Some aspects of the recommendation regarding courtroom sharing need more discussion and refinement, and my committee looks forward to playing a role in these discussions. My colleague, Judge Julie Robinson of Kansas, will be addressing this topic in a few minutes.

Second, and less happily, I must say that the suggestion in the draft report that the judiciary overspent to the tune of $835 million in its courthouse construction program during the period 2000 to 2010 is both unfounded and quite unfair and distorts what actually happened. None of the three reasons offered to support the draft report's claim of this kind of overspending can withstand fair scrutiny.

The first explanation by GAO for the alleged excessive cost—that we spent beyond Congressional authorization—is particularly disturbing. As Commissioner Peck has pointed out, supposed discrepancies between square footage contained in courthouse prospectuses and the ultimate size of the courthouse can largely be explained by differences between the GSA and the GAO in how gross square footage has been calculated and certainly not by any intent to evade or thwart the will of Congress. The report's chart on page 15 identifies the Springfield courthouse as having exceeded its authorization by 10 to 20 percent. I have not had access to the GAO's work papers, but based on the documents I have seen, this is simply untrue.

Between the design and construction phases in Springfield, we actually deleted one of the five courtrooms originally approved for the project. The construction prospectus predicted a total 157,750 gross square footage for our courthouse. As the building went up, I visited the site regularly and participated in monthly construction meetings for more than 3 years with representatives of the GSA, the architect, the contractor and a senior staff member from Congressman Richard Neal's office. The building's total square footage

when it opened in October 2008 was 162,000 square feet, about 2 percent, not 10 or 20, percent over prediction. If numbers for the other courthouses are as far off as they appear to be for Springfield, the GAO overall estimate of 1.7 million in excess square footage is not worthy of credit.

[Additional information follows:]

To be inserted after line 710 on page 34:

[Clerk's Note: Subsequent to the hearing, the Judiciary provided the following additional information.

[The source of the 162,000 square footage figure is an official General Services Administration publication entitled *United States Courthouse, Springfield, Massachusetts, October 2008.*]

The GAO's second explanation—that we planned for too many judges—while true to some extent, is unfairly exaggerated. We all have 20/20 hindsight. Between 1970 and 2000, the Federal court's civil and criminal caseload skyrocketed. Congress authorized more than 400 new district court and circuit court judges over those 30 years, plus scores of new bankruptcy and magistrate judge positions. It would have been irresponsible not to plan for comparable growth in 2000 to 2010. The 119 judges that they say were excessively planned for, fall easily within the average over the previous 30 years for congressional authorizations. That the caseloads flattened out in some areas of the country between 2000 and 2010, and almost no new judgeships were approved by Congress during that time, does not undercut the reasonableness of the planning decision in the year 2000.

Predicting the number of judges necessary in a planning horizon of 10 years or more is hard. We have welcomed the input of the GAO in tackling this difficult problem, and we welcome it today. Indeed, of the six recommendations about planning offered by the GAO back in 1993, the courts by 2000 had fully adopted five and partially adopted the sixth, which was largely superseded.

As with the current recommendations, these GAO recommendations served to complement the efforts we are already taking in the judiciary. A 2-year moratorium on courthouse construction starting in 2004, which has been noted by the chair, gave the courts a chance to take a hard look at our planning methodology and soon afterwards a new planning method, asset-management planning (AMP), emerged. AMP gives us the most accurate yardstick to date to identify courts and districts that truly need new courthouses and major renovations.

The draft GAO report overlooks the fact that while it is unfortunate to overestimate necessary court capacity, it can be catastrophic to underestimate it. We simply can't shoot low. New judges or senior judges will have no place to work or will have to be farmed out into expensive leased space. Moreover, while our planning horizon is 10 years, we all know courthouses will be with us far longer. Where a courthouse is not full within the 10-year planning horizon, it will inevitably be full within a relatively short period afterwards.

The third explanation by GAO for the court's alleged overbuilding is the failure to apply courtroom-sharing policies, and it is similarly unfair. As I have noted, my colleague, Judge Julie Robinson from Kansas, will address this topic in detail. I will only say that it does not make sense to criticize the courts for failing in the year 2000 to follow courtroom sharing policies that were only recently adopted by the judiciary after careful study and consideration.

The conclusion of the GAO report begins with a sentence that I heartily agree with, and I believe all of us in this room concur in: "It is important for the Federal judiciary to have adequate, appropriate, modern facilities to carry out judicial functions". As the committee chair tasked with ensuring that the court's physical facilities are adequate to perform our critical role, I find this sentiment somewhat understated. The Judicial Conference has a very serious obligation to ensure that the citizens of our country have

access to adequate, safe, and well-functioning Federal court facilities.

I look forward to working with this Subcommittee on this important but difficult task. I also look forward to a continued discussion this morning, and am happy to entertain questions.

Ms. NORTON. Thank you, Judge Ponsor.

Ms. NORTON. Finally, we will hear from Judge Julie A. Robinson, chair of the Committee on Court Administration and Case Management of the Judicial Conference of the United States. We also welcome her mother, who has accompanied her here as well.

Judge ROBINSON. Thank you, Madam Chair, and Members of the Committee. My name is Julie Robinson, and I am honored to be here this morning and thank you for inviting me. I am accompanied by the lady who put me through law school, Charlene Robinson. I am glad she is here with me.

I am a United States district judge in the district of Kansas, and since 2005, I have been a Member of the Committee on Court Administration and Case Management (CACM) for the Judicial Conference of the United States.

Since October, like my colleague, Judge Ponsor, who is the new chair of his committee, I became chair of the CACM committee in October. I have been asked to testify today regarding our committee's work in developing the Judicial Conference's new courtroom sharing policies and share the views of the judiciary on the recent report from the Government Accountability Office on the planning and construction of court facilities.

The primary responsibility of my committee is to ensure the just, speedy, and inexpensive determination of cases; inexpensive for the litigants, taxpayers, citizens, and others who come before our court to take advantage of our core mission. The availability of a courtroom is one of the judiciary's most important tools in meeting this goal. As a result, the Judicial Conference asked the Court Administration and Case Management Committee rather than its Space and Facilities Committee to take the lead in developing an appropriate courtroom sharing policy for the Federal courts. Thus, my testimony pertains exclusively to the sharing policy and not to other issues involving the planning and construction of court facilities.

My written testimony contains an overview of how we developed the new courtroom allocation policies and the judiciary's response to the GAO's report. But in my statement to you today, I wish to emphasize some key points about our new courtroom sharing policies and the problems with the GAO's proposed report.

As you know, our committee asked the Federal Judicial Center, FJC, to conduct the courtroom use study requested by your House Subcommittee. The FJC conducted this study independently by surveying 26 randomly selected districts representing various-sized courts.

The committee based significant changes to the judiciary's courtroom allocation policies on the findings of the FJC study, but it also noted the limitations in applying the findings too broadly or too literally. The FJC's findings provide national averages, distorting the picture of the courtroom use in any given court. If taken as an average, the existence of underutilized courtrooms in some

locations would negate the need for courtrooms in other busier locations; or provide an incorrect picture of the real number of courtroom hours in very busy courts or for courts experiencing peak workloads. Thus, the study's findings must be applied carefully.

The committee also noted that many courthouses were built in a different era when demographics supported the facilities. Even if no longer fully utilized, those facilities are an important link to the judiciary and the national government in those areas.

The committee cautioned that the courtroom usage data was collected over two 3-month periods. Thus, it may not be a complete picture of all courtroom use. For all these reasons, care must be used in applying these national findings to local projects.

We were careful in crafting the new policies to ensure that courtroom sharing would not unduly impede current cost savings or efficient case management. For instance, we accounted for the impact that delayed justice has on litigants, attorneys, crime victims, and others. We noted the cost savings of having an available courtroom and its effect in encouraging the parties to either be ready for trial or to settle their case. And we tried to ensure some certainty in the prosecution of criminal cases, costs such as travel and housing for defendants in criminal cases, and we have worked with Congress to reduce delay and cost in litigation.

The Civil Justice Reform Act of 1990, for instance, required all district courts to implement plans to reduce civil litigation delays. Those changes increased efficiency for the courts, but imposed costs that have been borne by the judiciary, including the need for immediate and certain access to a courtroom.

With these considerations in mind, our committee devoted a great deal of time and effort in developing an appropriate balance between meaningful courtroom sharing and effective case management. This effort included the FJC's comprehensive study, our negotiations with other Judicial Conference committees, and consultations with the House Subcommittee by my predecessor and the predecessor of Judge Ponsor on his committee. As a result, the Judicial Conference adopted a policy to provide one courtroom for every two seniors judges and one courtroom for every two magistrate judges. We currently have underway a courtroom usage study of bankruptcy courts, and my committee will consider a sharing policy for courthouses with more than 10 active district judges after the bankruptcy study is complete. We expect the bankruptcy study to be complete this summer, and we will be working on its findings this fall.

The draft GAO report proposes a number of sharing policies that are very different from those endorsed by the Judicial Conference, and include sharing policies that are still being studied or considered by my committee. These proposals are based on two sources of information. The first is a computer model of the FJC study data that was developed by a contractor for the GAO with no apparent claim to any particular expertise in the judicial system. Any model must be based on certain assumptions formulated by those with great expertise and understanding. The GAO does not describe the assumptions used to develop the model. Moreover, the GAO's recommendations, which may well have been part of the assumptions, are highly questionable.

For example, GAO asserts that the Nation's border courts and those with higher pending caseloads do make greater than average use of courtrooms, but other courthouses in those same districts offset that higher use, they assume. Yet it is entirely unrealistic to say that all courtrooms in a district are fungible, no matter where they are located. Proceedings cannot be easily transferred from one division to another, and it is not good stewardship of taxpayer money to transfer cases long distances and pay travel costs for U.S. attorneys, assistant public defenders, marshals, prisoners, court staff, and witnesses simply to find an available courtroom.

The GAO also assumes that every courtroom can be used for 10 hours each day. This is totally unrealistic and virtually impossible. Aside from the fact that it inflates the workday of a Federal employee by 25 percent, it assumes that jurors and litigants and witnesses and family members can be present for 10 hours at a time. Those people would have trouble arranging their schedules to spend the extra hours in the courtroom. This assumption alone grossly distorts the GAO's resulting courtroom sharing ratios.

I would also note that the GAO incorrectly assumes that criminal hearings can be accomplished by videoconferencing. Aside from the other participants that participate in criminal hearings, this assumption dismisses the rights of a defendant to have a criminal case hearing held in open court. I question the wisdom of basing courtroom planning assumptions that are premised on a waiver of a constitutional right and contrary to the requirements for the presence of the defendant set forth in Federal rules and case law.

The second source of information used by the GAO to support its proposals is a set of comments elicited from a 1-day confidential panel of individuals, a panel whose selection and agenda were greatly influenced by the GAO itself, but who found that courtroom sharing presented a number of problems that would adversely affect the administration of justice. Nonetheless, the GAO report discounts these judges' skepticism over long term courtroom sharing, the disservice of rescheduling an event due to lack of space, and the importance of having a courtroom available to encourage resolution of cases.

Let me share with you briefly from personal experience why the quick and rudimentary modeling program employed by the GAO would have disastrous results for the judiciary. If I am in trial, my courtroom is not being used 2.7 hours a day. It is being used at least 8 hours a day. In fact, I am in a heavy season of trials right now. For the last 7 months, I have been in trials almost back to back until last month—not unique, not unusual, all judges go through heavy seasons, as well as light seasons. There is no such thing as an average workday or an average workload or an average work week for any of us.

The judges in my court use courtrooms heavily because when we are in trial, we schedule other criminal hearings. We try to sandwich those in at the beginning of the day or the end of the day. Or we are in trial for perhaps only 4 days a week so that we can set aside a full day to handle other matters. Even with this scheduling, we have to overlap the scheduling of criminal trials and civil trials. If I didn't overlap or stack set, as we call civil trials, right now I would be giving litigants trial dates for their civil cases in

2017 or 2018, instead of 2011 or 2012, if I were to specially set every civil trial that needs to go to trial in my caseload.

We also have latent use of courtrooms, meaning courtrooms that aren't in use because many scheduled trials settle once they are given a firm date for trial. But this is unavoidable. For example, I am starting a civil trial early next month. I originally had 10 civil trials scheduled to start during that same time frame. Nine of them have settled; I am scheduled to go on the tenth. If that case were to settle today, I can't fill that estimated week long period of time with another trial. It is not enough notice to the parties and their witnesses and their attorneys who likely are scheduled to be in another courtroom during that time period.

In a courtroom sharing scenario, particularly for small and medium-sized courthouses, we simply cannot insert another trial at the last minute. And it is not only the tax dollars at stake, we see litigants who are almost bankrupted by the costs of litigation and discovery. Many of our cases that go to trial involve small businesses who cannot bear the heavy costs of litigation and the attendant costs of delay and rescheduling. And also individuals pursuing their civil rights and their rights under title 7 or other important rights.

An uninformed or hasty courtroom sharing policy will cause delay, it will increase costs, and it will impair our ability to dispense justice.

The key point I do want to make on behalf of the committee and the Judicial Conference is that we have taken our responsibility to examine courtroom utilization very seriously. We have made significant changes in the courtroom sharing ratios that we have adopted, and in our ongoing work with bankruptcy courts and beyond to the larger courthouses involving district judges. The judiciary has made great strides in reducing construction and rent costs by sharing. The policies reflect what the model simply cannot—the real world experiences of litigants, parties, and judges who sit in these courtrooms regularly. They also take into account the legitimate concerns of your Subcommittee, that the taxpayer money be wisely spent. Fundamentally, we believe that the policy changes we are adopting strike the correct balance between controlling costs and delivering justice.

I thank you, and I am open for any questions.

Ms. NORTON. Thank you, Judge Robinson.

Well, Mr. Goldstein, since it has been three against one, perhaps we ought to give you the opportunity to respond to some of the testimony before we go forward with our own questions. But before I do that, I was informed only after testimony began that Mr. Johnson has some opening comments. Do you want to do those now.

Mr. JOHNSON OF GEORGIA. Thank you, Madam Chair.

Just briefly, I would like to say as a practicing lawyer for 27 years, running between courthouses, both State and Federal, trying mostly criminal cases but some civil, some civil litigation as well, I do first of all appreciate the Constitution for having set up the three legs of the stool, if you will, of government. It is a three-legged stool, coequal branches, coequal legs. If one of those legs should be chopped off in any fashion whatsoever, then the stool starts to lean. And if you cut it off altogether then, what you have

is a leg that is not able to function and you don't have a functioning stool at that point.

So I think it is important that we remember that the coequal branch, the judiciary, has to have resources to function efficiently and effectively. And if judges are underpaid, and I know that we are not talking about that today, but if they are underpaid, overworked and are homeless, with not having a courtroom or an office to work from where, you know, where you are supposed to be at all times, it makes for a judiciary that is not functional. And thus, it lays the groundwork for the destroying of our great country which is dependent on this coequal branch of government system.

Mr. JOHNSON OF GEORGIA. Now, I realize Congress has responsibility for funding the operations, and Congress needs to be concerned about how the taxpayers' money is being spent and making sure that it is wisely spent, but we should spare no resource to support that third leg of the stool and to make sure that it does what it is supposed to do.

And so I view—I have a strong suspicion that any courtroom-sharing advice coming from outside of the court itself is—and produced, I would assume, by nonpracticing lawyers without an appreciation for juries, for pretrial issues, for motions, for the expediency that criminal laws require in the criminal law process, and some understanding of the civil justice system and how judges play an intricate role in terms of how those cases are decided either through pretrial motion or through things like trial settings, setting dates which encourage people to engage in either alternative dispute resolution or just plain settlement— there is so many niceties that go into this, and I am not sure lay people can appreciate.

So thank you, Madam Chair, for allowing me to make this statement. I will ask some questions, of course, to gain more knowledge about these issues. Thank you.

Ms. NORTON. I thank the gentleman. And I remind the gentleman that this hearing is not about cases and controversies, and that the Committee has always been respectful of the independence of the judiciary. And we want to make it clear again, the judiciary is not independent when it comes to building space. That is the province of this Committee and the Congress, which authorizes the money and is going to see to it that the money is spent. This hearing is about $835 million in taxpayers' money that was spent beyond the authorization of this Committee. This is a Committee that abides by the law, and the courts are going to abide by the law when it comes to space and the authorization of this Committee.

Now, I had asked you, Mr. Goldstein, since it was three on one on the GAO report, whether we should allow you to respond to some of the challenges to the GAO draft report. And it is a draft report. And Mr. Peck and all others are going to have the opportunity to respond in writing, but perhaps you would like to respond to their criticism of the report.

Mr. GOLDSTEIN. Thank you, Madam Chair. Just a few comments at this point.

I very much appreciate the panelists' comments because, as we have said, it is a draft report. And we use a draft report to be able to engage and obtain comments and try to come to greater agreement, which we will do once this report is finalized.

Just a few real quick comments. I think I would hope that Judge Robinson particularly might read the report again, because I feel that a number of the issues that she raised today, she made assumptions that she took out of the report that aren't quite accurate, as well as I think there are some things that she mischaracterized and did not fully explain. So I hope that she will reread the report before the judiciary's comments are provided to us in full.

With respect to Commissioner Peck, GAO and GSA have long had a very strong relationship and have worked together very well over the years. We can have honest differences, and it appears in this case we do. But I would make a few comments regarding Mr. Peck's charges where he feels that we did not—where our calculators were wrong. So let me make a few comments.

First of all, GAO relied on GSA to provide us all the information in the report. All the numbers we used are GSA numbers. GAO did not independently measure anything; we did not make any independent policy decisions. We used the policy guidance and standards that GSA has had in place.

For the 33 courthouses in the scope of our engagement, GSA provided us the total gross square footage via its E–Smart measurement database. This total gross square footage, in line with GSA's policy, includes the upper level of atriums and tenant floor cuts as part of gross square footage. So I don't know why Mr. Peck is saying that is not the case.

For our seven case study courthouses, GSA provided us with the blueprints with the space already measured and classified according to GSA policy. We verified that these measurements were equivalent to the measurements in E–Smart, but made no independent measurements or space classifications on our own. Therefore, the extent to which the upper level of the atrium floors and tenant floor cuts are counted as useable space are determined by how GSA classified them. Upper levels of the atrium floors are counted as part of the gross square footage, but not as usable space. Tenant floor cuts for courtrooms are counted as usable space for the most part and included in rental calculations to the judiciary, unless the tenant floor goes up to the penthouse, in which it is not included.

GSA's current policies on how to classify and count this space have been in existence since at least 2000. Mr. Peck's description of 2005 is not correct. During the course of our engagement, we received the GSA policy provided to regional offices in 2000 that describes the equivalent policies regarding the measurement of atrium and tenant floor cut space as GSA's current policy. Atrium and tenant floor cuts are not the only reason that these courthouses are larger than authorized. For example, the Ferguson Courthouse in Miami has more than 50,000 square feet of tenant space, and planned each of its 14 district courtrooms are about 17 percent larger than design guide standards.

Of the seven courthouses we examined in case studies, three of the seven had atriums large enough to be major contributors to the size overages. And we certainly don't dispute that large atriums push gross square footage. That is obvious. But the other four had no atriums or had atriums too small to be major contributors to

size overages. On these four, the size overages were largely caused by other issues such as extra tenant spaces or extra mechanical or common spaces. These four courthouses were all larger than authorized by percentages ranging by 5 percent in Tucson to 26 percent in St. Louis. Furthermore, of these four, only St. Louis had tenant floor cuts. So that issue is only a small part as well.

So those are just some of the things that obviously we will talk about more in our final formal comments once we receive GSA's comments. Thank you, ma'am.

Ms. NORTON. Thank you, Mr. Goldstein.

Mr. Peck, you can see the Committee is concerned that the authorizing committee was not informed. You talk about informing the appropriate committees. Do you understand that to mean the authorizers as well as the appropriators?

Mr. PECK. Yes, ma'am. Absolutely. And let me just make a point about the difference of measurements.

This is a complicated issue in the private sector as well as in the public sector, because it is always hard to explain to someone how a given floor plate, a floor of an office building, much simpler than a courthouse, can have different measurements. But whether or not you count the cuts in the floor for elevator shafts or even for electrical conduits and water pipes, whether those count as gross or net square footage to be charged to a tenant are issues of significant debate, in the private sector as well as in the public sector.

So what we have here is a situation that works like this: When we come to you for a prospectus authorization, and, as you know, we have detailed discussions with your staff and with the Committee about almost every one of those, we come to you at the beginning of a design process for an authorization.

At the beginning of that design process, we take the generic requirements of a court, which is done by multiplying the amount of square footage that you need for the number of courtrooms, the associated circulation space; ancillary spaces like attorney conference rooms, jury rooms, jury assembly rooms; plus space of other agencies that typically go with courthouses, like the marshals, sometimes parole and probation, and we give you a generic square footage and an estimate of the dollar amount that will be required to build the courthouse.

During the course of detailed design and construction, however, we make decisions about how we will align the courtrooms within the building, whether there will be an atrium, for what purposes they are. And so at the end of the process, we have built a building, and we have focused very much on our overall dollar authorizations and appropriations.

Square footages can vary. And as I can tell you, in the Miami courthouse, a huge amount—I am sorry, the Phoenix courthouse, a huge amount of the extra footage is accounted for by a very large covered atrium, which we and the designer might have made the decision to keep as an open courtyard, but we enclosed it, and that adds to the gross square footage of the building.

The problem I have with the GAO calculations is that GAO then takes that empty square footage, multiplies it by the dollars per square foot that you normally apply to building enclosed courtroom,

corridor, jury room space, and says all of that money is wasted. So this $835 million estimate is just flat out wrong. And it is——

Ms. NORTON. Mr. Peck, I think that is a fair point. But we are still left with 50 percent overbuilding. Let us give you your atriums. And I don't want to see any more atriums. Taxpayers are paying for space. Programs are being cut across the United States, and nobody knows when this economy will come back. The President has put a freeze across the board. Do you think we are not going to freeze here as well?

Even if I give you those points, let us say 50 percent of this space is attributed to atriums and tenant floor space, that leaves 800,000 square feet overbuilt for other reasons.

Now, I mean, all we want—we are not playing a game of gotcha here. We are trying to find a way to make sure this doesn't happen again. And with that much overbuilt space, wasn't there a legitimate reason to come back to the Committee for additional congressional authorization? You act as though once you give it to us, these things happen. Do you really expect us to sit here and take that?

Mr. PECK. Because we have mostly in hearings here and in the authorizing committees on both sides of the Hill and in the Appropriations Committee focused very much on the cost of our buildings, as I know you all want us to. We haven't focused as much on whether the square footage during the course of detailed design, both because of measurement anomalies and because of changes in the scope or design standards, add square footage so long as it doesn't add to the overall cost of the project.

Ms. NORTON. Square footage equals costs. Square footage and costs cannot be disaggregated that way.

Mr. PECK. No, they can, because there are gross square footages. For example, the empty square footage of the top 30 feet of space in this room doesn't cost anything to build.

Ms. NORTON. I granted you that. And we still find 50 percent overbuilding. And you say that the standard for reporting square footage overages are to be 10 percent. Let us just look at that for a moment.

While the costs may not completely be within your control, Mr. Peck, certainly the design should be substantially, if not completely, in your control. Wouldn't GSA task its architects to design to the authorized square footage of this Committee, period?

Mr. PECK. We certainly could, but that would be a mistake.

Ms. NORTON. And if so, why would we need more than 5 percent leeway?

Mr. PECK. I know, but here is what happens. May I give you a current example of how this can come about, how the square footage doesn't necessarily increase the dollar amount?

We are—on one courthouse project we are undertaking now under the Recovery Act, I believe it is Recovery Act funding, we are going to add a security pavilion to an historic courthouse.

Ms. NORTON. What is that? What is a security——

Mr. PECK. A security pavilion means that we are going to build out from the front entrance an enclosed space for the marshals and the court security officers to process visitors so that they don't actually get into the more seriously intense part of the building.

Ms. NORTON. Sort of like the visitor center here?

Mr. PECK. Yes, ma'am, Although it is much smaller.

Ms. NORTON. Yeah.

Mr. PECK. No comment. It is, however—in that case, we are going to be able to build that space within the budget that we already provided for the renovation, because we found ways to save money on the rest of it. We are adding square footage.

I will grant you, and I will tell you the judges have said, I have said, we should come back to you, We have not done it before. I would like to say it hasn't occurred to us because we've been so focused on costs. We will get back to you when we are getting square footage increases as design occurs. But one thing I will note to you that atriums in many cases, atriums sometimes called light wells, are a feature of many historic buildings and many current buildings in the interest of saving energy. So rather than have a strict standard when we are just coming to you for the first authorization and saying, let us never build a square foot more than we first anticipate, I much prefer the approach of coming back to you and saying, here is why we believe the square footage is going to increase, and particularly is that square footage going to increase the scope of the project beyond what the Committee intended, and is it going to increase cost. That is something we certainly want to come back and discuss with the Committee.

Ms. NORTON. Well, of course. As you know, Mr. Peck, this Committee has the greatest respect for the flexibility that is necessary in any and all building. What we don't respect is our authorizations being ignored. Yes, we are indeed—as long as we can have a discussion about increases in square footage given what the GSA has found, we will be fine. And there may be perfect reasons to increase. We just need to know it, because ultimately we are accountable, too.

We know that—we don't believe that you are building atriums in large open spaces any longer. Are you?

Mr. PECK. Not as large as some we have seen in the past. But, again, I don't want to rule them out in——

Ms. NORTON. The first time that I ever heard that an atrium saves energy. I would be most interested in that.

Mr. PECK. Remember, the difference between an atrium and a light well, which we don't count as gross square footage, is whether you put a roof over it. And the point of an atrium, the point of buildings like our headquarters building that is in the shape of an E, was that in the old days when you couldn't get so much lighting and air conditioning and mechanical ventilation into a building, you need to have areas that were open. Getting daylight into a building reduces the energy that you require to put in artificial lighting. So that is one reason.

Ms. NORTON. And as GSA has made some good progress on green roofs of various kind, if this is a variation on a green roof and you can show us that it saves energy, that is precisely what we are after.

We are aware that the largest expense in building construction is the external skin, the curtain wall. So if buildings are, by volume, larger, they will be more expensive. And we believe we have a mandate not to—Mr. Peck, I have been on this Committee for 20

years. You haven't been here all the time I have been on this Committee. When I came to this Committee, there was scandalous things being done to build courthouses. There were all kinds of—at taxpayers' expense, there was overbuilding welcomed, given the kind of luxurious spaces, extra kitchens, extra lavatories, extra gyms. I mean, this was a scandal in the courthouse.

Now, that has been drawn in. Now we are in overbuilding. I think I should be grateful, having been on this Committee for so long, that we are not building luxurious courthouses. There were actually judges who sat here who said that it was necessary for the administration of justice to have high ceilings, as if they had calculated in some way that justice would fall down if the ceilings were beneath a certain height. It was absurd. And it came from GSA—and here is where you need statutory help—GSA buying what some judges were saying. And, you know, we are Article 3 judges. We have to deal with cases in controversy; ergo, we have to do with everything about the courthouse.

Absolutely not. When judges begin to collect the money to build the courthouses, they will have that responsibility. As long as the Constitution gives us that responsibility, they are not going to peel off from the Congress the responsibility to stay within the mandated authorization of this Committee and of the Congress of the United States.

So I am pleased we are where we are, given that I know where we have been before.

I am going to ask the Ranking Member, before I proceed with further questions, if he has any questions.

Mr. DIAZ-BALART. I do, Madam Chairman. Thank you very much.

Mr. Peck, you just mentioned that you would rather come back to the Committee as opposed to just not allow you to do it for any cost increases, projection increases. Are you telling us now that before 2007, that was the case, and anything over 10 percent you would come back to this Committee? Are you committing now to do that again, to start doing that again; that if GSA sees that the cost is going to be 10 percent or above, that you would come back to this Committee as opposed to just move forward on it?

Mr. PECK. Yes. Mr. Diaz-Balart, what I was referring to was the requirement we have in appropriations. If we go over 10 percent, we have to ask for a reprogramming.

What I am saying is that if we think the square footage is going to go over 10 percent or whatever percent you choose, could be zero percent, on the square footage that we initially report, we are happy to come back and describe it to you and tell you the costs, obviously.

Mr. DIAZ-BALART. I think what you need to do is come back and request an amendment of that authorization. And is that what I am hearing is that you would come back and request an amendment of the authorization?

Mr. PECK. What I would prefer in the interest of management that is more efficient is some percentage of flexibility, because before we have to come back and get an amended prospectus, and here is why.

Here is why, when we first come back to you with a design prospectus, it is based on a very generic program for a building. We

then have to apply it to a site that we acquire. All kinds of things come in. And things can move up and down in the square footage we need. And rather than have to come back to you, because then we have to wait for you to have a hearing and a markup, I would rather have some leeway in there, but with the understanding that we would always report a square footage and perhaps have your staff at least have some leeway in there before we have to amend the prospectus.

Mr. DIAZ-BALART. We are now—just to make sure we are understanding each other, what used to be the case was over 10 percent is when you would come back. Ten percent leeway is leeway. Now, even for Federal standards, 10 percent leeway is a heck of a lot of leeway.

What I am asking you is do you not think—which is what you used to do before 2007—that you would come back to the Committee to ask for an amendment if it is above 10 percent? What is the right number? How much leeway; is it 30 percent, 20 percent, 50 percent? You don't think 10 percent is enough leeway?

Mr. PECK. I think 10 percent—like I said, 10 percent would be enough leeway to not have to come back to the Committee. And anything, if we hit 10 percent, we should have to come back to the Committee.

Mr. DIAZ-BALART. For an amended authorization. All right. I just want to make sure, because—again, I want to make sure of that. Our frustration, and that is why we speak with one voice here, is because we keep hearing—I hate to say this, with all due respect—a lot of excuses du jour. Again, you are saying that you want leeway. I ask you 10 percent; I got your answer. I am not going to hound on that. So we do expect, because, as you just said right now, that you would have to come back to this Committee for authorization, for an amendment authorization of anything over 10 percent, correct?

Mr. PECK. Yes, sir.

Mr. DIAZ-BALART. OK. Great.

Now, Mr. Ponsor, we all understand the importance of making sure that judges have the space they need. But regardless, it is very difficult to argue, and this report confirms it, that there are not empty spaces and courtrooms that are overbuilt. And yet when I heard your testimony, it was—and, again, very respectfully, I want to make sure I didn't misunderstand. I am almost hearing the fact that, yes, you said there are six suggestions that you like, but almost kind of justifying this overbuilding as if it really wasn't happening.

And let us focus on some outcomes, specific outcomes. Let us focus, for example, on in Long Island or Washington, D.C., or even in Miami where I am from. Are you going to tell me that those are not seriously overbuilt?

Judge PONSOR. I am not going to tell you that there isn't overbuilding in those three courthouses that you just identified. I have been to the Islip courthouse. It was built larger than it should have been. I agree with you.

There are specific reasons with regard to the Miami situation that I think help to explain what happened. I am not going to sit here and try and justify it to you. When I read in the report, I will

tell you frankly, that they have 2,800-square-foot district courtrooms in the Miami courthouse, I was like the cartoon character whose hat flies up in the air with a big exclamation mark next to it. We have 2,400-square-foot courtrooms. That would not happen today. We are tightening things down. Those courtrooms should not be 2,800 square feet, and I am committed to controlling that. We were talked into that, I am told, historically—it was not on my watch—by judges saying that they need 2,800 square feet because they have multidefendant trials. I have a 27-defendant drug gang coming before me. Don't tell me that Miami needs extra big courtrooms because they have multidefendant trials. We have an obligation to control that.

Now, we do have the building there that is contaminated with mold. That is no longer on our rent rolls. We have had to take it off the rent rolls. The Ferguson Building does have problems. There is a complex there that has difficulties. But I am not going to sit here and tell you that the building in Miami was one of our good planning days.

As far as the Prettyman Building here in Washington, D.C., I am frightened to even get into a conversation with you about it because you know it much better than I do. The only thing that I can say about the building is that it is one of those situations where our resources really can't be overwhelmed. We are maxed out on that site. That is going to be the courthouse for the next generation. We have got to have the resources to deal with what is going to be thrown at that court. We have nine judges in that court right now who are very close to coming into senior status; they are going to keep working, we are going to need space for them. They have a high security courtroom there with the plexiglass security screen. They have an Internet hookup with Gitmo for some of the proceedings related to Guantanamo.

That is a court that is very heavily used. It is also being used by the Washington Superior Court. It is being used by the Court of International Claims. It is one of those courts that, like my good friend Judith Resnik talks about wanting to use, we want to use the courtrooms more. We don't want them to be empty.

But let me say one thing about capacity and the fact that some of the courtrooms are not always being used. I know this may be an awkward analogy, but it occurs to me. My son, who I am very, very proud of, is on his third deployment in Iraq right now. He is up in a helicopter. They send the resources over there not to deal with averages. They don't send the resources over there to deal with minimal demands. They have to deal with anything that is thrown at them, and they have to have the capacity for the peak demands.

We know these peak demands are going to be coming along. We need our courthouses. We are the institution that cannot be overwhelmed. We have to have the resources.

If I can shift my analogy, it is like a power grid. The power grid is not designed to deal with averages; it is designed to deal with peak demands. We know the Augusts are going to come along, the hot weather is going to come, and we have to have the resources.

Mr. DIAZ-BALART. But, sir, with all due respect, we can all start talking about in general terms about where, what we need. But

when you look at the actual facts on the ground, we are way beyond that. We are way beyond that. You know, the D.C. One, it was designed for 41; 10 years later we are, what, 39 judges.

So I don't care what analogy you use, sir, power outages, power companies, you are way beyond that, you know. And I am glad, by the way—and let me first thank your family for its service to the country. Yours, but also your son's, which is important to know, and it is important to recognize it.

Judge PONSOR. Thank you.

Mr. DIAZ-BALART. But using that in context, $800 million in overspending, that is a heck of a lot of armor for helicopters that we are not funding, et cetera. So let us put it in perspective.

Here is the bottom line, because we can talk about specifics all day long. I think the report has a lot of specifics. I would respectfully ask also what Mr. Goldstein said, that you all reread that report and look at the bottom line. And as opposed to coming up with all sorts of reasons why the overbuilding took place and all sorts of excuses as to why the overbuilding took place, that we figure out and we find ways to stop it. Not to just look at, oh, yeah. No. How do we stop it? Because you are looking at real numbers here, real money. And as the Chairwoman said, particularly in tough times, we have to be even more conscious of that.

Judge PONSOR. If I could respond for a minute and a half. It is a painful accusation.

Mr. DIAZ-BALART. It is not an accusation.

Judge PONSOR. In my mind, most respectfully, it is an accusation that is not fully supported. And I agree that there should be no overbuilding, and I agree that individual courts can be criticized. But the criticism contained in this report is very substantially exaggerated, in my opinion. And I understand, anyone would be concerned at an $835 million waste of taxpayer money.

In my opinion, the amount was nothing like that. And that number, to allow it to hang in the air without response is something that I really can't do. That number is an unfair and exaggerated number, in my opinion. Let me give you a specific example.

Mr. DIAZ-BALART. You will have the opportunity to respond.

Judge PONSOR. And we will. In my courthouse they say we are 10 to 20 percent over the authorization. I asked my people to pull the construction prospectus. The construction prospectus is 158,755 gross feet. The final courthouse is 162,000 gross square feet. I am surprised we went over even by that much, because we cut one courtroom out of the process when we were going through it. We were really killing ourselves to try to keep this courthouse down to what it should be, and I think we succeeded. We are 2 percent over, not 10 to 20 percent over. That is the fact. And I don't know about these other numbers. I don't have the GAO working papers. And we have been given nothing from them to work with.

Mr. DIAZ-BALART. And I think it would be unfair now to go into the specifics of every single issue, and obviously you are going to have the opportunity to look at that, to review that, and to get back.

I do want to, though, mention another issue. I understand, for example, the L.A. courthouse, which is something this Committee has been dealing with for a long time, supposedly—my under-

standing is there are fewer judges today in L.A. than there were over 10 years ago, which is when the courthouse was proposed. Is that L.A. courthouse still a huge priority for the judiciary? Number one priority, is my understanding. Is it still designated as a space emergency?

Judge PONSOR. Yes.

Mr. DIAZ-BALART. Can you explain why?

Judge PONSOR. First of all, I want to compliment you, because you are doing a very good job of putting your finger right on our sore spots. The L.A. courthouse, as you know as well as I do, has been a huge difficulty for all of us. It remains our number one priority. It is a very important courthouse. It is, what, the second largest city in the United States, I guess. It is an important facility. I think the Chair has visited it. I have visited it. I have walked around the courthouse.

It is a dangerous courthouse. It is a courthouse that is falling apart. It is a courthouse that is hard to try cases in. And we need a solution in Los Angeles. We do not have that solution right now. And we are going to work closely with you on anything that happens in Los Angeles.

Mr. DIAZ-BALART. I appreciate that.

Judge PONSOR. If you don't want to call it a space emergency, it is an emergency. It is a very nonfunctional situation that is hard on the courts. I cannot comment on whether the number of judges has gone down. I just don't know that.

Mr. DIAZ-BALART. Well, again, here is where we are having a hard time understanding. This Committee authorized $400 million. Now, $400 million in anybody's book is real money.

Judge PONSOR. Yes, it is.

Mr. DIAZ-BALART. I understand that. I guess the request is $1 billion. You know, when we are dealing with—there are still unutilized—there is unutilized space there. Already you have fewer judges today than there were 10 years ago, my understanding. You have $400 million that has been sitting there. And the attitude is we have less judges, we have unutilized space, we have $400 million sitting there, and that is not enough. Now, you see that that is our frustration.

Judge PONSOR. I can understand it.

Mr. DIAZ-BALART. So I am not trying to pick on a specific issue, but here is what I think we need to see. We have a report that shows that there are serious problems. You have mentioned some specifics; you are saying that those numbers may not be quite right. Nothing is perfect in life, I understand that; however, I am telling you right now one case that we are familiar with, that this Committee is familiar with, L.A., I am not quite sure what the report says about L.A., but I don't know if it is underreporting, overreporting. What I am telling you is that it is hard to argue the case of L.A., and yet it is still a huge priority. And you have $400 million sitting there, and that is not enough. Don't you understand where our frustration comes from?

Judge PONSOR. I certainly do.

Mr. DIAZ-BALART. And do you not understand, sir, why the American people have to be saying this is totally broken? Four hundred million dollars is not enough in a situation where you

have, again, less judges today than when this thing was planned for. You have $400 million in the bank, you have unutilized court space, and it is still not enough. And people are losing their jobs.

Judge PONSOR. Mr. Peck may want to comment on that. He may know better than I.

Mr. PECK. Two things. One is on Los Angeles, I understand before I came back to GSA that there was an estimate at some point of a $1 billion project. We are trying to rescope the project; we will be nowhere near $1 billion, I can tell you that. I am aware of how much money we have in bank, and we are going to try to bring in that project as close to that number as we can. But it has not been built. So we have not overbuilt it yet.

Ms. NORTON. Would the gentleman yield for a moment? When it was authorized, it was not $1 billion. But because you have let the money sit in the bank with costs, of course, construction costs, going up, somehow the people think this Committee—I regard this as nothing—it is not a stalemate, it is a strike. Congress said $400 million it has got to be 10 years ago. They decided that wasn't enough then. You come back. Yes, I understand you, Mr. Peck. It is $1 billion; it is probably more than that now. Does anybody really think we are going to get up off of more money for the L.A. courthouse? It can just sit there as far as we are concerned.

Mr. PECK. Well, what I was going to respond to, we need to take a look at—I have heard this, too, that there are fewer judges than there were before. Normally when we hear that, it is because some judges who were on senior status have retired or have passed away or something has happened. But we will get back to you on that.

But one thing I do want to clarify again. There is a bottom-line number here that I have alluded to that I want to say again so that we can get over the $835 million number. We added up the appropriations that we got for the 33 courthouses studied by GAO. The total appropriated dollar amounts—and these are completed buildings—was $3,046,000,000. And the funding required for completion was 3,314,000,000. So that was an increase overall of about 8.8 percent.

So just so we don't—just so we get out of this sense that there has been some huge overbuilding of the program, I am just telling you that we held to within 8.8 percent of our budget. And I have to tell you, having just come out of the private sector projects, that is a pretty good record as well.

Mr. DIAZ-BALART. Again, a couple things. There seems to be, however, a consensus—and nobody is denying that we are overbuilt, number one. Number two is almost 9 percent—being within 9 percent of the budget is not exactly something that I think any of us should be proud of.

Mr. PECK. No, sir. But in a period in which construction costs escalated for various reasons in this country, because we were building in a period generally of an industry boom, construction costs escalated by about 58 percent during that period, and we held our costs to an 8 percent overage. So I am just telling you there are reasons. I am only—when I say I am really proud of our project is when it is on time, on budget, and now as we now say on green.

Mr. DIAZ-BALART. And I agree, that is when we should be proud. Again, there will be ample opportunity to discuss the real specifics of the report.

Let me just go to another issue, if I may, Madam Chair. The issue of how—the estimates of how many judges are going to be there in the future, and that is obviously something that has not worked. I am not pointing fingers or blaming anybody. It was not done on purpose, but we know it doesn't work. We know those estimates have not been accurate. Are you looking at changing that? Are we throwing that out finally because we know it is not working, and coming up with a more accurate way of determining, of making those estimates?

Mr. PECK. I think we have already thrown it out. We at the beginning of this program back in 1993, 1994, whenever you count the beginning, I believe we were looking at 30-year requirements on the court. We were assuming that there would be judgeship bills coming rather regularly. That has not been the case, but we have not made those kinds of projections on recent courthouse designs.

But as I said in my testimony, we are in conversations with the courts, and we would—I believe all of us, including you and the Members of the Committee, need to come together and reach an agreement on how we do project needs for courthouses as we go forward, because all of us, it is not an easy business, but we sure ought to have an agreement on how we are going to go about doing it.

Mr. DIAZ-BALART. We have a long list of knowing that it is not working.

Mr. PECK. That is correct.

Mr. DIAZ-BALART. And that is not recent. That is 20 years or whatever that may be.

Now, the issue of courtroom sharing. You know, I do want to just very briefly—I mentioned a little bit at the beginning, it makes no sense to me why we are not doing a lot more of that. A lot more of that. Is it a little bit more difficult to share? Maybe. But, you know, there seems to be a trend now around the country where we have to more thoroughly utilize the people's assets, and this is one where we clearly can do a much better job. The report shows it. The Committeehas been saying it. The Chairwoman has been saying it for a long time. And I hope that is not something that is also swept under the table, and that we don't just look at ways why it cannot be done as opposed to look at ways how we are going to get it done and how we are going to figure out how to get it done.

If the report's actual way of getting it done does not fulfill your needs, then I would like to see how you are going to get it done, not how you are not going to get it done and why it is impossible to do it, as opposed to, all right, that may not be the right way. Let us figure out a way to make sure we utilize those courtrooms, that they are shared, because that is happening throughout the country in schools and in public buildings, and it makes no sense that we cannot do it with the courtrooms. I mean, I don't know if—I think the American people are just fed up from Congress, from the administration, and from every other segment of government with bureaucratic answers as to why we can't share space, why we

can't do these things, as opposed to figuring out ways to get it done.

Are we expressing that? Is that getting across today?

Judge ROBINSON. Congressman, we agree. We agree that we should be good stewards of taxpayers' money, and that contemplates that we seriously consider courtroom sharing. And we have been responsive, the Judicial Conference has been responsive, and are now being proactive in that effort.

When we first started talking about this issue in 2005—and I understand there were many years of talking about it before that. But in 2005, when Congressman Shuster really charged us to go back and start studying this, we did that. And we have enacted a 2–1 sharing ratio for senior judges, a 2–1 for magistrate judges, a careful and considered study of bankruptcy judges. And we are going to go beyond that and try to determine what kind of economies of scale we can accomplish, particularly in the larger courthouses with more than ten district judges. So we take this very seriously.

But there are so many things in the balance that's what I want to suggest to you and to tell you today, and one is that we also have a duty to taxpayers and citizens or noncitizens, whoever they are, who come into our courtrooms, to give them a place where they can resolve their situations without too much undue expense. And for every time we reschedule something or continue something, not to mention any talk about moving a trial or a hearing some distance away, we are talking about real costs shouldered by the very people that you are talking about as well. They are paying their own expenses, but they are paying their attorneys' fees and attorneys' expenses. And oftentimes all of it is at the taxpayer's expense.

I think Representative Johnson spoke of being a litigator both in criminal and civil cases. And I don't know if any of his cases involved appointed cases, but oftentimes it is the taxpayers that are shouldering the entirety of the criminal case. So when you talk about rescheduling or moving, you are talking about real dollars and lots of dollars. That is part of the balance that we are attempting to strike.

We could look at averages, and we can look at models, but it doesn't replicate what goes on in the real world. And that is why we have to consider the experience that we continue to have in litigating these cases. And I have read the GAO study. I take issue with Mr. Goldstein. I have read it, and I have read it again, and I can read it right now. And what it will not tell you is what their assumptions are.

There are underlying assumptions for that modeling. In my remarks I tried to glean what some of those assumptions would be based on some of the things in the report, such as 1- to 2-day average trials. I have never had an experience of having a 1- to 2-day criminal trial. I think most district judges will tell you that it takes the good part of 1 day to select the jury in even a small, short-term criminal case. The defendant has a right to a jury trial, both sides have a right to select a jury, a jury that is going to be of their peers, but also a jury that is going to be objective and impartial. There is no such thing, in my experience, as a 1-day criminal trial for that reason, or even a 2-day criminal trial.

Similarly, with civil jury trials, even though they may be short, to say that any modeling is based on that assumption—and I don't know that it is. Again, I don't have their assumptions. To say that it is a 10-hour trial day doesn't replicate what goes on in the real world. We are talking about human beings. Jurors can't sit there and listen to evidence for 10 days and process it. The court reporters can't report for 10 days straight and process it, even with an hour off for lunch.

I mean, there are limitations. And that is why I appreciated what Congressman Johnson had to say for those of us in the field, if you will, who are on the ground. Our experience matters, and that is why my committee, along with the—well, the FJC is the one that conducted the study. But those findings have to be evaluated in the context of human nature and the experiences that we have had in our many years of collective judging experience.

Mr. DIAZ-BALART. And nobody is arguing that. Nobody is arguing against that.

On that point, though, by the way, let me just ask GAO, in some of the courthouses, a few of the courthouses where there is sharing, do we know if there has been a horrible issue of delays or moved cases, et cetera?

Mr. GOLDSTEIN. I would raise a couple points, sir. First of all, Judge Robinson is again not correct about the assumptions she is making in her report. And so I can only reiterate that she is misreading it, and I would encourage the judiciary in their comments to read it carefully, because what she is saying is simply not accurate. She is mischaracterizing our report in many regards.

With respect to the question you are raising, sir, we had numerous interviews with judges, with clerks and others across the country in this report in our work. We went out into the field and we went to many different courthouses, particularly courthouses that have shared. Combination of real-life experience as well as the models that we developed show that there have been no delays. The model shows that there will be no delays.

If you look and recall page 24 of our report, the Federal Judicial Center's own data shows that, on average, a district courtroom is used by a judge for court-related purposes 2 hours a day. The rest of it is either not used or used for other purposes.

Mr. DIAZ-BALART. Where do those numbers come from?

Mr. GOLDSTEIN. The FJC, based on the study they did. On its face sharing can be accomplished. The degree to which sharing is accomplished should be up to the judiciary. We are not suggesting that they follow our model exactly. They can develop their own model, their own parameters, their own assumptions. But I would add, the parameters by which our model was developed was not done by GAO. The parameters of our model was based on the National Academy of Sciences panel that we put together that we asked the National Academy to do. It consisted of a 1-day session as well as numerous other interviews that we did with roughly 24, 25 panel members. It was a discussion of conditions of and challenges to sharing, and it is from there that the parameters were developed. They weren't developed by GAO.

Mr. DIAZ-BALART. Here is the issue. I mean, again, and I keep saying, I don't think this is the moment to start talking about the

specifics of every single issue of every single detail. However, I am not a lawyer, but I know that for lawyers in particular, words matter. And I would just like to say, as opposed to consider sharing, no; that you look at ways to make it happen, to figure out ways to make it work, as opposed to you are going to consider whether there should be sharing.

There is a consensus on this Committee, and, you know, I understand that there may be and there is going to be ample opportunity to review the numbers, and there may be some discrepancies, and there may be some differences of opinion as to if the model is perfect, if it works. But as you just heard, nobody is saying that you follow that particular model.

But I think what you are hearing, and I just want to make sure that it is clear, is not that you should consider whether courtrooms should be shared, but you should find ways to share courtrooms. And I just want to make sure that I am not—that that word was not used—how you are using that word.

Judge ROBINSON. You are exactly right, Congressman Diaz-Balart. And you are right, we are wordsmiths. And the point I want to get across is that we are not considering sharing—we have been considering sharing ratios. We have been sharing. I think if GAO or anyone else went across the country and talked to judges—and the study encompassed a much broader questionnaire and requests for experiential information—you would find that many of us, I would say most of us, at one time or another have shared courtrooms either because a courtroom is out of commission, or there was a shortage of courtrooms, or we were in an historical courthouse where there simply weren't enough courtrooms, or one of us was engaged in a particularly long trial. I have actually had to take another trial to another division in my district because of high-profile concerns and because of the length of the trial and because my courtroom wasn't large enough to accommodate it. We do share.

What we have been trying to do and study very deliberately and with great consideration is what the appropriate ratio ought to be, particularly as we are looking forward. But to say that we are only considering sharing is not correct.

And I do take issue with the comments made about the judiciary not appropriately reading the GAO report. We are hampered by the fact that we don't have the assumptions underlying this modeling. I wish we did. And if we did, I would be here to address them more specifically. I have tried to glean what I think some of those assumptions might be from certain statements made in the GAO report. And some of those statements, I think, in fact, come from comments that were made by the select group of judges that the GAO talked to. And it is interesting, because I have talked to some of those judges, and they are very upset because their statements and views were misrepresented. All of them said, yes, short-term or as-needed courtroom sharing can be accomplished. We know this because that is our experience. We have done it. But to say that that does not result in longer delays is not at all consistent with any of our experience.

If we have to all share 2–1 going forward from here on out, you can bet that at some point you are going to be wanting to conduct

a hearing because there are going to be a lot of litigants that are going to be costed out of our system when they have to wait twice as long to get to trial. That has been our experience, and that will continue to be our experience, because that is the way this works.

Now, and to talk about collegiality and the sharing of courtrooms and scheduling of courtrooms, that is a small piece of the algorithm of all the variables that we have to consider when we are trying to get our 300 or 400 or how many cases it is into trial within a 3-year period. Congress has tasked us with getting a civil case to trial within 3 years. Under the Constitution, and as augmented by the Speedy Trial Act, we are tasked with getting a criminal case to trial—jury trial—within 70 days with some exceptions. And these are things that are part of our critical mission, but also among the so-called variables that we deal with on a daily basis when we are trying to get these courtrooms scheduled and ready for trial.

Does that mean our courtrooms always have the lights on and are used every minute? That does not mean that, because, as you know and I know, with civil cases and criminal cases, ultimately the large percentage of them do settle. But we need the readiness of the courtroom. And it is because of the readiness and availability of the courtroom that we are able to even get those cases in that posture.

A lot of this has to do with human behavior. A case is not going to settle if the lawyers know that you don't have a courtroom ready and available for them to go to trial, because they are going to be working on their other 50 cases that they have got in their quiver or their inventory.

I see Congressman Johnson laughing; it is because he has been in the trenches and he knows that is how it works. You work on the thing that is the most pressing and the highest priority in your inventory.

So it is an important tool. Whether it is latent use or actual use, the availability of a courtroom is what makes our system work.

Mr. DIAZ-BALART. When you all come forward to us and asking for additional space, do you put in there latent use of space? Is that part of it? Or is it—I have never heard that.

Judge ROBINSON. That was part of the FJC study. By that we mean the example I gave you earlier, that when I have 10 civil cases set for trial, I stack them. That is the only way I know how to efficiently do this. All but nine have settled. If that last case settles, and it is about 2 or 3 weeks out from going, then I am going to have a 5-day period of latent use, meaning that that case was scheduled for trial, but for whatever reason they have now settled it. And I can't move another week-long trial in there.

Now, I can fill part of that time. I can find some criminal hearings where the parties are ready, and I am not going to be violating due process to move them into a slot, because I have to take those things into consideration. I can't force people to go to trial before they are ready because there are due process considerations. I can't force them to go to a hearing before they are ready, sometimes because there are due process considerations. But I can find some time to fill part of that, but I cannot move another week-long trial and fully fill that space. That is what we call latent use of a court-

room, knowing that it is scheduled, but it may not ultimately be used.

Mr. DIAZ-BALART. I understand that, and I think the model did account for that. But however, look, again, I just want to make sure that you understand. You can't take humans and human nature out of this process. I understand that. I do think, however, that there is a pretty strong case that we have clearly overbuilt. There is a very strong case, I think hard to argue against the fact that—which you all agreed to, that the process that we have been using to determine what the needs are is not accurate.

I would tell you that those two issues are, as the report said, and something that this Committee is arguing for a long time, we haven't had cooperation, frankly, of people agreeing with us until now. But I am glad that people are now agreeing with us.

So is there a possibility that the models are not accurate? Yes, of course, because of human nature. However, I would respectfully tell you and I would like to say that it is very difficult to believe, to understand from our perspective that we cannot do a much better job, we cannot do more sharing, et cetera.

And because the Chairwoman has been too generous with our time——

Judge PONSOR. May I say something to reassure you, Congressman Diaz-Balart? We aren't considering sharing. We are sharing. All of the courts on our current 5-year plan have sharing. Anniston, Alabama—sharing. Charlotte, North Carolina—sharing. Greenbelt, Maryland—sharing. Greenville, South Carolina—sharing. We have sharing. We are applying our sharing policies for magistrate judges and senior judges in all of those courts that are on the 5-year plan. It is not under consideration; it is happening.

Mr. DIAZ-BALART. I understand that. There is no doubt that we can always do better, and I think this report shows potential ways to do better, and I hope that we take those seriously.

I do want to end with one point, however, going back to the L.A. courthouse. I think you heard from the Chairwoman and you hear from me, and I think you have heard from this Committee and the Full Committee, that this constant request to go from $400 million to $1 billion or whatever it is——

Judge PONSOR. That is not happening.

Mr. DIAZ-BALART. OK. And I just hope that we don't see that again. Thank you. That alone would be a huge step in the wrong direction.

Judge PONSOR. That is not happening.

Mr. DIAZ-BALART. Thank you.

Ms. NORTON. Well, I appreciate that Mr. Diaz-Balart wanted to clarify that. If you hear some exasperation here, it is not because of the witnesses before us; it is because this issue has plagued this Committee for so long. For example, the L.A. courthouse. What a thorn in our side the L.A. courthouse has been. You all want to let the $400 million rot, so be it. But we could not in good conscience say, well, since they delayed 10 years, let us throw $1 billion at them.

And also, before I go on to Mr. Johnson, I want to clarify this notion of the trenches, the notion that you are before people who don't understand the practice of the law. The Committee is full of

lawyers, and the Subcommittee, including your chair, not only is an attorney who practiced before the Federal district courts, the courts of appeals, and the Supreme Court of the United States before she was elected; your chair also clerked for a very distinguished district court judge and saw up close how the system operates.

I am now a Member of the United States Congress. Above all, I understand the separation of powers, and I understand the difference between our responsibility and yours. I have the utmost respect for the judiciary, but I ask you to respect the separation of powers as well and to understand that this Committee, which enjoys the broadest consensus on this issue, will be held accountable if we do not hold the courts and the GSA accountable as well.

Mr. Johnson, have you any questions?

Mr. JOHNSON OF GEORGIA. Thank you, Madam Chair.

I would let you all know that, no, it was not any appointed cases that I tried. They were all paid, private-paid cases. And never did any advertising, you know, maybe other than an occasional Yellow Page ad that really didn't work, or in a local newspaper, something like that. But my 27 years of practice in private practice—I opened up my law office when I got out of law school, literally hung a shingle up and started practicing law.

So I am proud of my humble beginnings, and I am proud of how far I came. And I got there based on word of mouth and reputation, and so my reputation among those who employed me and recommended me, and who I tried cases in front of and opposing counsel, they all know that when you have got Hank Johnson in the room, that he was going to be prepared. He was going to know what the issues are or were. So I bring that same skillset to this position. I am very proud to serve on the Transportation and Infrastructure Committee. It is a very important Committee.

Another one of my assignments as a congressman is as the chair of the Courts and Competition Subcommittee of the Judiciary Committee. Wearing the hat as chair of the courts, let's leave off the other part of it, let's just deal with the court's aspect of the Judiciary Subcommittee, I work closely with judges.

Now I know why the judges in the Judicial Conference are so enthralled with the fact that I am there. It is not because I am me, Hank Johnson, it is because they have a lawyer who has actually practiced and yes, in the trenches, who can utilize that expertise to assist our judiciary, which, quite frankly, has been under attack in this country since the 1980's due to decisions such as Brown v. Board of Education and others where politicians who sit in these great big, hundred-foot ceilinged committee rooms that are humongous in size, but yet not very often do we have the Full Committee meet. And when we do, it might be for 2 or 3 hours.

No judicial officer took part in deciding how much space we need for a committee room. No executive officer, the President didn't come in and say I am going to tell you how much space you need and when you will have to share. Everybody respected the fact that the legislature should control its use of the space that it decided to build. And I will tell you, we have a lot of space in this building where there are committee rooms set up that we don't even use. And if we had somebody to take a look at that, they could always sling arrows at us. Every Committee Chairman wants to have a

hearing room that he or she can call home, and every Subcommittee Chair has a room that they can call home. It is the committee room.

So a lot of those Subcommittee rooms don't end up being utilized very much, but I am going to shift now from my perspective on the issues that we are dealing with here today, having given my experience and having shared with you my frame of reference for making the comments that I make, and also making sure that people understand that I said at the end I am going to ask questions, I am going to learn more.

I have never been to the Los Angeles courthouse before. I have no idea about that, but I will tell you I do have an idea about one branch of government dictating to another branch what that branch thinks it needs without having a good appreciation of the real world. And so I will always be standing up for the third branch of government, the third equal branch of government.

I will say this: When I was practicing law, Monday morning, 8:30 a.m., going to the courthouse, driving by the courthouse, I would see a long line of people, jurors, litigants, witnesses, some law enforcement waiting outside in the cold and in the wind and in the rain trying to get into the courthouse. That is one of the big reasons why atriums are a great idea. Those people have to be afforded some kind of comfort. That is why we have a justice system as the third branch of government, and we should not dog the people out who we are dispensing justice to. And I fight for that.

I am going to ask a couple of questions. Mr. Peck, your role at GSA public building services is to overseeing Federal courthouse construction; is that right?

Mr. PECK. Yes, sir, and management.

Mr. JOHNSON OF GEORGIA. And management.

Now, with respect to the 33 courthouses completed since the year 2000, including 3.56 million square feet of extra space that has cost the government an extra $835 million we are told to construct, and an extra $51 million to rent, operate and maintain, can you tell the Subcommittee how those figures were arrived at?

Mr. PECK. Again, it is the GAO's report. But what they did, they estimated the amount of square footage due to various causes that they felt was overbuilt in the courthouse, including, as I noted, atrium space, double height courtroom space, that counts as gross square footage technically. They multiplied that, what they calculated as gross square footage, by the average dollar amount it costs per square foot to build a courthouse, and calculated that as the excess cost, that plus some other scope increases.

As I noted, that may be an interesting calculation, but we do have real numbers on how much it cost us to build the courthouses. And the real number that we had, as I noted, and my numbers are based on 32 of the 33 courthouses, I am noting, is that we appropriated $3.46 billion and change, and we built them for $3.314 billion. The difference there is $268 million. So in other words, the calculation that GAO made was a theoretical calculation, and we are saying that the assumptions on which they were made were erroneous.

Mr. JOHNSON OF GEORGIA. So you disagree with GAO's findings in that regard?

Mr. PECK. Yes, sir.

Mr. JOHNSON OF GEORGIA. To the tune of about $268 million?

Mr. PECK. Yes, sir.

Mr. JOHNSON OF GEORGIA. That is a lot of disagreement; $268 million worth of disagreement right there.

When did GSA adopt a policy for measuring gross square footage of courthouses?

Mr. PECK. Well, we have adopted different measures, different ways of measuring square footage. I am going to have to go back and see. My information is that we formally adopted a new measure somewhere in 2005, 2007. Mr. Goldstein says it was back in 2000.

The point I would make is that the way of measuring what counts, it is not how big the building is. The building is as big as it is; anybody can see it by looking at it. The question is what counts as square footage for various purposes. And the issue we have had before the Committee, Congressman, is when we first bring a proposed authorization to the Committee, we have only a very generic program for a courthouse. And as we build it out, we come up with more detailed square footages. What we have a good record of doing in most instances, I will say Los Angeles is an exception, is holding fairly rigorously to the budget, the dollar budget we first came up to, and the square footage tends to move around.

Mr. JOHNSON OF GEORGIA. According to GAO, GSA relied on the architect of the building to verify the size of the building and did not expect its regional or headquarter's officials to monitor or check whether the architect was following GSA policies. Is this an accurate assessment of GSA policy at the time?

Mr. PECK. I think in many cases it is, yes, sir. The architects and engineers, as I said, there are various standards that people use to decide what counts as gross square footage and what counts as rentable square footage, and net square footage is an entirely different measure in many cases. So in a lot of cases, we asked the architects to measure the square footage. We changed that so we now do our own independent evaluation.

So what happened here is that the square footage that an architect reported may not have been the same as our standard, and so what got counted as square footage for various purposes can be different even though obviously the size of a building is the same.

To make a long story short, I think in some cases, the architects and engineers whom we hired and said give us your calculation of the gross square footage did it on a commercial standard that they are used to, and may not have been the standard we were reporting to the Congress and in fact using ourselves.

Mr. JOHNSON OF GEORGIA. Judge Ponsor, to what extent are you or your office consulted by the GSA during its construction and operation of courthouses?

Judge PONSOR. We work very closely with GSA, particularly in the areas where judges have special expertise. It is GSA's responsibility, and they are the ones who are in charge of the construction project; but they consult closely with judges as the construction unfolds. And I played a part in that process. For example, when we were designing the courtrooms, GSA built a plywood mock-up, a very inexpensive mock-up of the courtroom which I visited along

with lawyers and assistant U.S. Attorneys, and we scoped out the sight lines in the courtroom to make sure that I would be able to see the witness from where I was sitting and the jurors could see the attorneys. We played a role in that manner. I did participate in discussions as the courthouse was being built.

Now the people in charge were GSA, but they were open to listening to us and listening to our suggestions. I would add that part of the meetings were also attended by a senior staffer of Representative Richard Neal's office who ultimately had an office in the building and had an interest from the point of view of the community in making sure that the process moves along in a measured way and that we had a courthouse that corresponded with the original concept.

Mr. JOHNSON OF GEORGIA. Are you saying that you had a legislator in there helping to determine the use of courtroom space?

Judge PONSOR. No. Let me make that very clear; no, we did not. But we had a GSA representative, an architect representative, and a contractor representative and various other people. We were interested in knowing the timing of how fast things were going along, whether there were going to be delays, what the courthouse ultimately was going to look like, and whether we were going to vindicate the architect's design concept that had been approved and authorized by this Committee.

Mr. JOHNSON. So there was no nefarious intent on the part of the legislator?

Judge PONSOR. None whatsoever.

Mr. JOHNSON. And certainly the Judicial Conference and the GSA have not been involved in a conspiracy to defraud the taxpayers by overbuilding courthouses; have they?

Judge PONSOR. Absolutely not. I think that is the most painful thing to read about in the GAO report. I can tell you, we were honestly not trying to deliberately mislead Congress at any point. You build a building out in the open. We were very transparent. I think we came in with a really tight project. There was no effort, no desire, no intent to horn-swaggle anybody as we were building our buildings.

I am pleased, and I embrace the recommendation, and I know Commissioner Peck embraces the recommendation that we will inform you, we should inform you when we go more than 10 percent over the approved prospectus. I think that is a fair and a good suggestion, and it is a way that we can tighten up the process. But really, we were not trying to mislead Congress or thwart any intent of this Committee or of Congress. We understand that you have that sphere of responsibility, and we have every interest in making sure that you can do your job.

Mr. JOHNSON OF GEORGIA. Thank you, Judge Ponsor.

Judge Robinson, what is your committee's role in assessing—well, let me ask the question like this: At least 10 years ago, caseloads were projected. The number of judges projected, the number of courtrooms to serve those judges projected. How do we go about making those projections?

Judge ROBINSON. The projection for number of courtrooms or judgeships?

Mr. JOHNSON OF GEORGIA. Both.

Judge ROBINSON. My committee does not have a role in that. Court Administration and Case Management, CACM, has the broadest jurisdiction of all of the committees in the sense that it deals with any issues that deal with court administration or case management. The reason we are taking the lead in terms of the courtroom sharing ratio is all about case management because we understand that we need to strike a balance between sharing and cost containment. Those are very important objectives. But at the same time, we must have effective case management, ensuring constitutional rights, statutory rights, that the litigant's expenses are not out of control because of our delays or because of the requirements we place on them, in terms of moving from one place to another. So it is our role in case management that causes us to be the lead committee on this particular issue.

Mr. JOHNSON OF GEORGIA. Do you agree with the GAO's findings that question the judiciary's caseload projection methods?

Judge ROBINSON. Again, that is not something with which I have particular familiarity. It is our Judicial Resources Committee in part that looks at that and does statistical analysis. But understand that we project on the basis of a number of things, and some are assumptions based on demographic shifts and those sorts of things. We would expect that they wouldn't be perfect projections.

For example, I was a bankruptcy judge for 8 years before I became a district court judge, and I don't think any one of us could have projected 10 years ago what the bankruptcy filings would be now with any accuracy because we couldn't have projected that the economy would be in the state where it is now with any accuracy.

So many of these projections are based on things that none of us can predict, and all of those have very direct effects on caseloads, weighted caseloads, filings, the need for judgeships, and all of those things.

Judge PONSOR. If I can just chime in on that since the Space and Facilities Committee does do some projections, I guess I can put it this way. If anybody has a crystal ball, we could use it. If anybody can see perfectly where we will be 10 years from now, we would be happy to know. If anyone has a method to help us do that, we are constantly trying to refine our methods. We use different statistical approaches to try to triangulate to make our projections as accurate as we can.

We don't want resources we don't need. We are not trying to get resources that can't be used. But this process of projecting is very, very difficult. For example, between 1970 and 2000, there were over 400 new judges authorized, a little over 100 a decade.

In the 10 years between 2000 and 2010, Mr. Goldstein criticizes us by saying we were 119 judges over in our estimate. If we had congressional judgeship authorization bills during that 10 years that were even the average of the preceding 30 years, we would have been received 100 additional new judges. That didn't happen.

Mr. JOHNSON OF GEORGIA. In fact, the numbers requested by the Judicial Conference were more than what was actually approved by Congress; isn't that correct?

Judge PONSOR. Far more.

Mr. JOHNSON OF GEORGIA. Four to one?

Judge PONSOR. I would say that it would be that in that neighborhood. There are judgeship authorization bills pending now before the House and the Senate. I believe there is a bill that would authorize 51 new district and circuit court positions that is now pending before the Senate. We don't know when there is going to be a new judgeship bill. We do know some day there will be a judgeship bill; and if there had been a judgeship bill and 100 new judgeships had been authorized between 2000 and 2010, as they were between 1970 and 2000, and we hadn't planned for them, we would be sitting here and people would be saying: What on earth were you thinking by not planning for those additional judges? You could look at the figures for the past 30 years, it was plain as day, and you did nothing.

Judge ROBINSON. If I can just illustrate how that affects courtroom sharing ratios in our consideration of what the appropriate ratio might be, we have unfilled needs in terms of judgeships. But we also have a labor force called senior judges, and that is the first population that we looked at in determining what is an appropriate sharing ratio.

To call one senior judge the same kind of person as the next senior judge is not giving them the tribute that they deserve. Our senior judges today span the age ranges of 65 to 102. I happen to know the 102-year-old. We are going to celebrate his 103rd birthday next month in Wichita, Kansas, and he is still showing up for work every day and hearing cases.

So when we talk about projecting the needs of senior judges, we have outliers, and we have had some problems in estimating. But we have to understand that senior judges vary from district to district and courthouse to courthouse. Some of them have the same caseload as the active district judges. Some of them have full caseloads. Some of them have 50 percent caseloads or 25 percent caseloads. Some of them hear specialized cases. Some of them take the whole panoply of cases. So when we talk about what a senior judge needs in terms of courtroom space, we have to consider they are different people and they have different workloads.

Nonetheless, we determine that a 2 to 1 sharing ratio would be appropriate considering this vast array of individuals that we are considering and the outliers, and there really is no average. So I say all of that to say that when we talk about projections—again Judge Ponsor was illustrating that the projections were based on a history of having filled judgeships—and at the same time we are looking at courtroom sharing ratios that we hope reflect the fact that we have this active labor force in senior judges that are helping us get through our caseloads despite the shortage we have in unfilled judgeships.

Mr. JOHNSON. Because your caseloads are going up in both civil and criminal litigation?

Judge PONSOR. They skyrocketed between 1970 and 2000. We had about a tripling of our civil caseloads in that 30-year period. We had a 50 percent increase in our criminal law filings during that period. During the last decade, we had, in some parts of the country, a flattening out of that explosive growth.

But if you are sitting in the year 2000 and you are looking back and trying to plan, that is what you would have seen. It is true and

I have to concede that some of our filings have begun to flatten out in some areas of the country in the past decade.

Mr. JOHNSON OF GEORGIA. Let me tell you something, just like your son would agree with this maxim that I am getting ready to lay out, I agree with it also, and that is it is better to have and not need than it is to need and not have.

With that, I will yield the balance of my time.

Ms. NORTON. Some statistics for the record. Since senior judges have been mentioned here, senior judges for the most part, do not wish to sit and don't have to sit in criminal cases and most of them choose civil cases, according to our statistics, and only two in 100 civil cases are tried.

I want to correct, since Mr. Johnson is a new Member of the Committee, I want to correct your notion that there is a room for every Subcommittee. There is one Committee room for all six Subcommittees. We all share this one room. All six of us, and we have to bid and we do cooperate and bid in order to have a hearing. So I may have to postpone a hearing because someone from transit says he has something more urgent and that occurs. So I do not want to leave the impression that we are trying to put you under a standard that we ourselves do not conform to. That is not the case.

I also want you to know that in the last decade, according to the statistics reported to the Committee in both civil and criminal cases in the Federal courts has been flat. That is 10 years. That means it gives us some basis to look forward based on the way statistics are handled in the first place.

Judge Robinson, you say on page 14 of your testimony that we should not adopt the GAO recommendations because they are based on a flawed understanding of the judicial process. So let's see what your recommendations for sharing are based on. Has the judiciary ever modeled the Federal judiciary center data with computer software of any kind to determine how much courtroom sharing the empirical evidence actually supports?

Judge ROBINSON. Madam Chair, I think there may be a role in modeling, use of modeling in making forward projections, particularly as they pertain to a particular courthouse or a particular area for which a courthouse is being constructed. But to say that modeling is a tool that should be used to try to develop some kind of national average on sharing ratios and without considered and great attention paid to what the experience has been, I think is a flawed analysis.

Ms. NORTON. Well, a model, of course, would take into account the experience. That is what a model does. A model is not just statistics, Judge Robinson. If you have not modeled—and that is the way we do things today— experience is a factor, and a very important factor for a correct model. If you look at how we do economic models, nobody just adds up, multiplies and subtracts.

It is very complicated how to do a model, so complicated that we use computer models. If you have not modeled the data to determine how much sharing is possible, how did the Judicial Conference determine that two senior judges can share one courtroom?

Judge ROBINSON. Well, we based that on a very intense look at caseloads, a variety of factors—caseloads, number of judges, age of

judges, use of the courtrooms. I shouldn't say we, because it was the FJC. In the courthouses and the courtrooms that were studied, it was a very complicated process of measuring every minute that a courtroom was used and how it was used, to determine what these averages might look like. That was then supplemented by a questionnaire that was sent to all district judges and magistrate judges and senior judges, as well as to a great number of attorneys, to get that experiential piece.

Ms. NORTON. Can you demonstrate that the GAO's recommendation of three senior judges to one courtroom, which they report is supported by their modeling program, is wrong?

Judge ROBINSON. What I can tell you is that a 2-to-1 ratio for senior judges is a dramatic increase from the 1 to 1 ratio traditionally that we have. We agree.

Ms. NORTON. We agree on that one, so let's not go back there.

Judge ROBINSON. But to go beyond that, the GAO study doesn't tell us what their assumptions are. We don't know what those assumptions are underlying the modeling. All we can do is glean that from certain information.

Ms. NORTON. What you need from the GAO is an opportunity to look at their model so you can understand the assumptions underlying their model?

Judge ROBINSON. I look forward to doing that because what I can tell you is there are a number of misstatements in their study that do not at all represent, one, the things that they were told during their experiential so-called piece of study when they talked to the panel judges; and, two, some of the other statements in their report are not correct or consistent with what any of us believe or what the FJC study would show. I mean, the length of trials, the average length of trials, for example, is a huge component that one must consider, and there is no such thing as a one to two day trial.

Mr. GOLDSTEIN. That number comes from the AOUSC itself, ma'am. Second of all——

Ms. NORTON. Mr. Goldstein, would you hold for a second.

Judge Robinson, over and over again, and I think this needs to be on the record, you have acted as if he is using one set of statistics and you are using another. Would you clarify that, Mr. Goldstein. The data you used came from where?

Mr. GOLDSTEIN. The data we used came from the FJC. We are using the judiciary's own data. It is completely modeled. As you yourself have said, ma'am, you can model, and the government models all the time, extremely complex things: nuclear fallout; we model global warming. We model all sorts of things in America today. To say we can't model Federal courtrooms when they are not being used half the time is preposterous on its face, I am sorry.

Judge ROBINSON. If I can respond. My guess is, and again, if I can see all of the GAO's assumptions and how they used this data, I think I would be able to answer this question better, so I am somewhat hampered here. But I think when they came up with that average of 1 to 2 days, they were talking about all court events, or at least hearings and trials. But there are lot of hearings that take 30 minutes or an hour, but not trials.

For some purposes you may want to look at those as one set of data, but for others purposes it doesn't make sense to; particularly

when you are modeling the use of courtrooms for trials, it would be flawed to consider all of the other types of hearings that go on in courtrooms.

Ms. NORTON. That is a fair point. Mr. Goldstein, did you consider hearings, trials, all manner of things that go on in a courtroom?

Mr. GOLDSTEIN. The model includes everything that occurs in a courtroom, including all unscheduled events and cancelled events for a previous week.

Ms. NORTON. Her point is a trial can take days, and an unscheduled event doesn't happen.

Mr. GOLDSTEIN. Absolutely. I agree with that. But the point is trials generally take 1 to 2 days. That is the average time. That information was provided by the Administrative Office of the U.S. Courts. If that is not correct, then we will have to take up that issue with the AO.

Ms. NORTON. So we are dealing with common data there. Mr. Peck.

Mr. PECK. Madam Chair, may I suggest, as you know, we are all commenting on a draft GAO report. Normally there is a period in which we talk to GAO about the report. We don't always agree, and we submit our agency comments. Sometimes they are in the nature of a dissent. Sometimes it is to clarify. I have been involved in computer modeling, and one of the issues is that you do need to know what all of the assumptions are. I would suggest that you might ask us, I don't know if we need to come back, but I think we ought to sit down and see what the assumptions are, see what alternate assumptions the courts might make, and see how the model comes out.

Ms. NORTON. I think that is precisely what Judge Robinson is very justifiably saying, that she doesn't understand the assumptions. And as you say, the normal way, now that the draft report is out, is for her to respond, for all of you to respond, and then of course, the twain shall meet. And I think from the report will come some essential good. I can already see that from the testimony here today.

But I do want to clarify the notion that we are not dealing with some kind of mysterious science here. For example, quoting from Judge Robinson's testimony: We would love someone to write an algorithm that really works.

Let me ask whether you know about the experience of courtroom sharing in the Southern District of New York which I think we all would agree is one of the busiest district courts in the country. A case study in the FJC report shows that they share one active and one senior judge. This has been deemed a success in that no trial was delayed and no judge lacked for a courtroom when he or she needed one because, guess what, they decided they wanted to make it work.

So they weren't dealing anecdotally with what would happen if we had witnesses waiting and they come from across the country, they wanted to make it work and that is one senior to one active. Existing experience that I would commend both of you and Mr. Peck to take a look at if you want to look at a busier court than probably most of you see that has made something work of a sharing nature that we are after. We are not laying down a rule of

sharing here today. We have already gotten your understanding that some sharing, particularly given what we understand about the economy and about the expectations of the public, is in order. The only question is to get together and to figure out how to make that work.

In your testimony, Judge Robinson, on the availability of courtrooms, you say many judges argue that the advantages of certainty, efficiency in cost savings gained, and let me say that again, advantages of certainty, efficiency and cost savings gained far outweigh the cost of additional courtrooms. Has the judiciary ever attempted to quantify the cost associated with sharing versus nonsharing? How could you arrive at the notion that it far outweigh? It sounds like you are talking about some set of data that has not been described here this afternoon.

Judge ROBINSON. The costs we speak of are not costs to the judiciary, they are costs to the litigants. And we are charged with the just and inexpensive and efficient determination and resolution of cases, understanding that we serve litigants, American people who come into our courtroom. So it is those costs we are trying to strike in the balance.

Ms. NORTON. So are we, Judge Robinson. With all due respect, as I tried to make clear, we are not sitting here as a bunch of nonjudicial imbeciles not taking into account the rule of law and the importance of the system of law we operate under. I have tried to make that clear. You used the word "costs," and yet you have not done any study that shows what the cost would be.

At least GAO has done a study. You may disagree with the underlying assumption, and you are going to find out what they were. But when you come before us and make a statement that is as bald as this, many judges you say argue, you don't say a study finds, the advantages of certainty, efficiency and cost savings gained far outweigh the cost of additional courtrooms, I have to shake my head.

Judge ROBINSON. Madam Chair, what I will say in response is that I think Congress understood that the costs were significant when they held us to a standard of completing a civil case within 3 years because they understood that the average case ought to be finished, whether tried or settled, in less than 3 years because of the attendant cost to the litigants—not just their emotional or their psychological cost, but the real dollars that they pay in terms of attorney time and expenses. So that is what I was speaking to, and that is the balance we are trying to strike.

Ms. NORTON. We have to find that balance, understanding we all are looking for that balance and we do not want to polarize this search. It is not the judiciary versus the Congress who can't find a balance. We believe that all of us working together can find a balance. The tone you hear from us really has to do with 20 years of no sharing, no balance, and overspending. We finally have come to a point where we have had to throw up our hands; but that does not mean that we do not intend to adopt the kind of problem solving that I think will come out of this hearing.

Mr. Goldstein, your recommendations we understand are based on sharing by judge type as, for example, Article III judges sharing

among themselves and magistrate judges sharing among themselves; is that right?

Mr. GOLDSTEIN. That is correct. The reason we separate Article III judges from magistrate judges is because that is among the parameters that our national academy panel suggested were appropriate.

Ms. NORTON. Because magistrate judges don't handle jury trials; is that it?

Mr. GOLDSTEIN. The kind of trials they handle are different. They are certainly different durations. They don't tend to interact all that much. These are some of the things we heard, and they felt it would be appropriate to model them differently.

Ms. NORTON. Have you modeled what courtroom sharing might be possible if all Article III judges were to share all courtrooms as a common resource, the way we do here, under the assumption that all courtrooms are built to the same size and with the same features so that they are indeed a fungible resource of some kind?

Mr. GOLDSTEIN. We modeled all district judges and we also modeled senior judges and all magistrate judges separately. We also, just to see what it would look like, we did run a model, taking a look at if you had all judges on sort of a fungible level where any judge could use any courtroom. So yes, we did.

Ms. NORTON. You have to forgive me if I don't see that as more efficient.

Mr. GOLDSTEIN. It is more efficient. We were following parameters that we felt were useful because they were developed through the panel process that we went through when we brought together judicial experts. But you are absolutely right, it is more efficient.

Judge PONSOR. Let me say that magistrate judges do try jury trials. They don't try criminal felony trials, but magistrate judges do try lengthy civil jury trials.

Ms. NORTON. I was trying to take away all the differences and put all Article III judges in the same category. If you did all of that, why won't there just be a pool for centralized sharing? What would be wrong with that?

Judge ROBINSON. That is the next thing that we are going to look at because we think that there are economies of scale that can be achieved. But understand that a number of courthouses are small to medium. Whether we can achieve economies of scale is questionable when you are talking about only two active district judges, or one. I sit in a division, I am the only active district judge, and I have two senior judges along with me who work full-time. So there are those differences.

But magistrate judges also have a much more immediate need typically for a courtroom because they don't know when someone is going to be arrested. People are arrested and they are brought in for that initial appearance in short measure. So they need ready availability, but they do not need a 12-box jury.

And bankruptcy judges, it is a different study. And I have been a bankruptcy judge. I have been in the trenches, if you will forgive me. It is very different. And they are in a period where they are experiencing a heavy caseload and a great number of filings. They are in the courtroom a lot is what I can tell you anecdotally. So I think there is a value by measuring by judge type because our

work tends to differ. Although I will say this, looking at case management, case management is really a function of a district-by-district or courthouse-by-courthouse thing. There is no uniform national standard and that is because we are all trying to be as efficient as possible.

There are districts where magistrate judges, except for criminal jury trials, are doing all of what Article III judges are doing. There are other systems or places where magistrate judges are not doing very many civil trials. It is all a matter of how can we effectively organize our work pool, our labor force, in a particular courthouse to handle the caseload that we are dealt.

Ms. NORTON. The differences you describe are real. But aren't there, in the interest of cost savings and efficiency, aren't there some standards that you think would work across the board for, for example, Article III judges, magistrate judges? No one is trying to custom-make courthouses the way we have before. If you don't custom-make them, then you have got to have some standard that everybody agrees to as a minimal standard. Maybe you rise above it on some occasion, otherwise we are back to where we were, custom-made courthouses, and why have we bothered in all of this.

Judge Ponsor, how does the judiciary select its courthouse projects for your 5-year plan?

Judge PONSOR. We have a number of steps that we go through. We start with a feasibility study when it is requested, and we look at the courthouse and we project forward as to whether we need that courthouse. We have had, since about 2007, a new process called asset management planning, which is an extraordinarily detailed very, very thorough analysis of all of our courthouse inventory that allows us to develop yardsticks to measure the urgency of the need of particular courthouses.

And interestingly, as a result of that AMP process, which we are about a third of the way through now, we have actually eliminated a fairly large number of courthouses that were lining up on our 5-year plan for new courthouses. In other words, we have gone to these courthouses and said, We don't think that you need a new courthouse. We think you can deal with a renovation.

So the fact that we are able to take a clear picture of what the courthouse actually needs and what it looks like, and to some extent sometimes, and I will be honest with you, pry the information out of the courts to get the information about what they have got there, how many people and courtrooms they have, and the data that we need to really plan, it has allowed us to begin to sequence the courts and deal with the courthouses that have the very greatest need.

Ms. NORTON. In other words, number one will be the courthouse that is most decrepit, shall we say, in greatest need and you have developed a system for deciding which courthouses get precedence for construction?

Judge PONSOR. We have four criteria which are scored in the AMP process. First of all we look at the court systems. Is the air conditioning working? Are the windows leaking? We had a judge in North Carolina who was in the process of sentencing a defendant when a piece of the ceiling broke out and hit the defendant on the

head. That is really adding insult to injury. So how is the physical plant holding up?

Second, do we have enough space for all of the judges in the courthouse?

So you have systems, you have space, and then we used to make this our primary consideration, and in fact, we have diminished it by a few points, and that is security. We look at how the judges, the public, the litigants, the lawyers are at risk when they come into the courthouse. What we have found is, if we make that qualification too far up on the scale, frankly, everybody is worried about security. There is hardly a judge anywhere who is not going to say we people in Chicago, we people in Puerto Rico, we people in Miami, we people in San Antonio, we people in Los Angeles, we have the worst security. And Detroit. We should get a new courthouse right away because somebody is going to get hurt. That is the hardest.

It is not exactly a threat, but it is the hardest thing to hear: "Somebody is going to get hurt and it is going to be on your head if you don't give us a new courthouse". So we have had to step back from the security issue. It is now 25 percent. We have a 30–30-25 percent to try to make that just a little bit less and look at how is the court functioning, is it big enough, and secure enough? Then we look at the design guide and try to figure out whether we have problems with courtrooms that are tiny little courtrooms and are way below the design guide, way below what anyone in this room would want a judge to have to cope with. And we put that all together and it allows us to score all of the various courthouses and determine where in the sequence they should come.

It is a refinement that has had a lot of very intelligent, hard-working and resourceful people putting a lot of time in on it, and which we continue to be committed to, and which will allow us, I think, to do our job a lot better.

Frankly, it used to be back in the old days, and you probably know this better than I do, the district that could make the biggest noise, the district that had the biggest clout in some arena or other was the squeaky wheel that got the oil. That is what we are trying to get away from. We are trying to adopt an objective measure that will allow us to say to certain courts, I am sorry, you are just not in line right now. There are too many courthouses ahead of you.

And believe me, in my role, I get calls from other judges. They accuse me of being a toady for the AO and not getting out and fighting for their courthouse. "What is wrong with you? It is your job to deliver the goods". We have to say to them: "I am sorry, let me compare your courthouse to the other courthouses that are ahead in line".

So we are working hard to develop an objective yardstick that will allow us to prioritize these courthouses and put them in order.

Ms. NORTON. Judge Ponsor, while we may have differences on the number of square feet that we end up with or we are sharing, it looks like you have a fairly rational model for at least deciding which courthouse goes first and the like. But the Ranking Member couldn't resist saying, I wonder if, and I wonder right alongside him, if L.A. went through this rather rational process you are describing.

Judge PONSOR. I don't know if it was part of our literal AMP process because it was selected prior to the time that process was really in gear. I can be corrected on that.

Ms. NORTON. I would bet that it would fit in terms of need.

Judge PONSOR. Having been there, I think physical plant, and I have to look into this issue that Congressman Diaz-Balart mentioned about the number of judges going down and fitting them all in the courthouse. You are a step ahead of me.

Ms. NORTON. That is over time; it has been so long. What he is saying is now the number of judges have been reduced.

Judge PONSOR. But its score as a physical facility has got to be really low, and certainly the security worries me a lot there. They have some of the toughest cases in the country. They have Mexican drug cartels cases with 30 and 40 defendants. I went into their high security courtroom. They have benches that will cover up the defendant's feet because they are shackled while they are in the courtroom. And I have to say, I almost never shackle defendants in a courtroom. But sometimes they have to do that during trials. They have got some really serious situations there. We are not going to be talking about a billion dollars, but we have to come up with some kind of solution for Los Angeles.

Ms. NORTON. We note that there is a funding for the Lancaster courthouse. Why is that not in the 5-year plan?

Judge PONSOR. I believe that Lancaster was going to be a lease construct at one point. We had this tool, which the OMB has now told us they do not want us to use any more, where we could ocasionally do a lease construct project, and I think Lancaster was going to be a lease construct.

Yes, it was not going to be a federally-owned building. It was going to be built and owned by a private entity and leased to the government. It was a tool that we could occasionally use in situations where you had a very small courthouse and very unique situations. OMB came to us, I think, a year ago and said we are not going to allow that any more, no more lease constructs, and that is the end of lease constructs. So we had just a little exception, kind of rotating out there where we would occasionally do lease constructs, and we got caught in the middle by a change in policy where OMB said you can't do lease constructs any more.

So, we said if you say we can't do lease constructs, we won't do lease constructs. We are going to do all federally-owned buildings. But Lancaster was kind of hanging out there. I am not quite sure how far I should go with the Lancaster courthouse, but I guess I would have to say as tactfully as I can, that was a courthouse that was not driven by our AMP process but was prioritized as a result of external pressures, which I hope we will not be subject to much longer in developing our courthouse program.

Ms. NORTON. I am glad OMB got there before we did. This was below the prospectus level, and I understand there have been two built a year.

Judge PONSOR. Very few. We had one in Yuma which we were hoping to build, and that was a lease construct.

Mr. PECK. And that is now federally constructed.

Ms. NORTON. Imagine leasing a courthouse; suppose they decided to put you all out; my, my, my.

I have another question for you, Judge Ponsor. Thirteen courthouse projects and the most recent 5-year courthouse plan have an aggregate of 33 new judgeships not as yet authorized. Do you think it is reasonable for the judiciary to expect the Congress to authorize this many judgeships for the 13 locations when the number constitutes roughly the same number of judgeships that the Congress has authorized during the last 20 years for the entire country, for all 94 districts and some 550 locations?

Judge PONSOR. I was not aware that the number was that high. I have before me my own notes on all of the projects in our 5-year plan. I have a proposed new magistrate judge and a new bankruptcy judge in Charlotte—that is two, three. One new district court judge, a proposed new magistrate judge, and a proposed new bankruptcy judge—another three in Greenbelt. In Greenville, South Carolina, we have one new district court judge we are planning for who has already been approved by the Conference. In Harrisburg, we have one new magistrate judge already approved and one bankruptcy judge proposed.

They go on. But I didn't think the numbers went up that high. In Mobile we have one proposed new judge and one bankruptcy and one circuit judge. We have two in Nashville, one district and one magistrate. We have one in Norfolk, Virginia, one bankruptcy judge. I am not doing the arithmetic as I am talking, but I agree with you that there are a number of judges that are planned for in our 5-year plan that have not yet been approved by the conference but which are statistically——

Ms. NORTON. How could you plan for more judges than have been authorized by the Congress over 20 years for the entire country? That is concerning. The figures we have, and we have them here, 32 new, 19 senior, adding up to 52. So I wonder how you ever got to such an overestimation of judgeships given the fact that amounts to the number that Congress has authorized for the entire country for a generation.

Judge PONSOR. First of all, if that is how high the numbers are, they are higher than I have calculated, and I have to agree with you, that number is too high. And we are certainly willing to work with you in collaboration to make sure that as these courthouses are authorized, that we aren't too high.

There are people who say something else to me, and this maybe is a topic upon which reasonable people may differ. I have judges who are moving into new courthouses or are in the planning stages of their courthouses who say to me: How can you insist that we enter a courthouse that is full the day we move in?

Ms. NORTON. How often does that happen?

Judge PONSOR. At least half a dozen times that I can think of.

Ms. NORTON. If that is the case, how do these poor judges make due? I bet they share courtrooms, Judge Ponsor.

Judge PONSOR. Well, certainly under our policy, senior judges and magistrate judges will be sharing courtrooms. Let me say about courtroom sharing, I have no objection in principle to the notion of appropriate courtroom sharing, even by some district court judges. It is hard. I know it is going to sound whiny for me to give you anecdotal evidence about just how tough it is, but I think what really bothered me about Mr. Goldstein's suggestion was a cookie

cutter 3-for-2 solution across the country, which would be in certain courts—and I don't want to sound melodramatic—but it would be something close to a catastrophe to make district court judges work under those circumstances.

I agree in certain circumstances maybe——

Ms. NORTON. Why would it be a catastrophe? I express no opinion, but somebody who tells me it would be a catastrophe, you must be basing that on something, and I would like to know what.

Judge PONSOR. I will tell you what it is based on. And I am afraid I just have to break down to anecdote and 26 years of experience. Let me just tell you where I am right now.

I started a 5-day nonjury race-discrimination case involving a man whose liquor license was turned down. I got 5 days into it. I had to suspend because I am now in the fourth day on a hearing of a motion to suppress on a criminal case that is going to trial later in June. It happens to be three young white kids who are charged with burning down an African American church in Springfield the day after President Obama was elected. It is a case that has gotten national attention. It is very high profile.

So I have got one civil case I have stopped, a motion to suppress that I have tucked in there. I have had to bump a civil trial involving a local guy named Berkshire Blanket from Palmer, Massachusetts, who has a little blanket company, and he is suing his IT man. That case had to be postponed after they were all set to go so that I could make room for my hearing on——

Ms. NORTON. In your courtroom?

Judge PONSOR. I am the only frog in the pond. If I were trying to share that courtroom, if all three judges were trying to——

Ms. NORTON. Just a moment. There wasn't another courtroom in the entire courthouse, sir?

Judge PONSOR. In my courthouse?

Ms. NORTON. No. You have a courthouse.

Judge PONSOR. Yes.

Ms. NORTON. You have a courtroom.

Judge PONSOR. I have one courtroom.

Ms. NORTON. Suppose you had access to other courtrooms.

Judge PONSOR. If there are three district court judges—I am doing a bad job of expressing this, and I am sorry. I will just step back and see if I can make it clear.

If you have three judges trying to coordinate access to two courtrooms with that kind of complicated docket, it is an impenetrable——

Ms. NORTON. I would agree with you. That is why I want Mr. Goldstein to share with me his modeling for centralized sharing. I think—and I think there has been some agreement here. I don't know how these two judges get together with three cases. Who in the world wants to put you through that? If there is centralized sharing—there might be problems with your time, Judge Ponsor, and I can understand that, but it seems to me it would be far less problems with courtroom assignments than if three judges have to get together and have a little conference every time they have to decide which of them gets to use a courtroom. That seems, to me, to build inefficiency into inefficiency.

So as long as we are doing it, why don't we just say, look, we are one big family of Article III judges. None of us is better than the rest. And when one brother judge or one sister judge needs a courtroom, she ought to have it, especially if it is not being used. There is no ownership of something within a courthouse that belongs to the people of the United States. A judge cannot be assigned ownership of a courtroom.

Judge PONSOR. I couldn't agree with you more.

Judge ROBINSON. Madam Chairman, I think what Judge Ponsor was illustrating—and it is my experience, too, because I come from a small courthouse in a small district, that I am the only active district judge in my division. So if I am sharing my courtroom with a senior judge or a magistrate judge, and I have a schedule like Judge Ponsor has—and I have had that very experience—and the senior judge is in a trial session as well and also has strong needs and considerations to have his case or cases go to trial, now we have a problem. And there have been times that I have moved a case primarily because it was high-profile, and there were going to be a lot of people involved, and I have a courtroom that is small and can't accommodate a great number of people. I have moved that case 60 miles, but with attendant costs and more delays.

And I say all that to say that we do share, and we do accommodate, and we are collegial, and we do step up and help each other. But sometimes—for example, if I can give you one more anecdotal piece of evidence, I twice have tried a 3-month trial in another division 60 miles away, and I needed a courtroom for 3 months. It was a 3-month criminal jury trial. It just so happened both of the times that I was there, all of the other judges in that division had heavy trials, back-to-back criminal or civil, and we were vying for limited court space, and it was difficult. And to try to choose between the small business owner who is being costed out by attorney fees and the criminal defendant that has speedy trial rights is a difficult thing. And when I spoke of the algorithm, that is what I was talking about. It is those sorts of real-world difficulties. And I am not suggesting it is like this all the time.

Ms. NORTON. And when I spoke of the experience—in response to your algorithm concern, when I spoke of the experience of the Southern District of New York and cited to you how they made it work, I was speaking from real-life experience, too, not anecdotes about having to move one trial, but about one of the busiest district courts in the United States. And the reason it works is because they made it work.

You have indicated you want to make it work. Frankly, that is all we need to hear. We understand there are extraordinary differences, even hardships. The greatest hardship of all at the moment is on the taxpayers of the United States. And, frankly, that is the hardship that most concerns us at the moment. We will not be able to go before the Congress to get additional money for courthouses if this is all we have to show.

Mr. Peck.

Mr. PECK. You know, I think I have now been a party to these conversations with a break in service, obviously, for 14 years, and we have had a lot of conversations over courtroom sharing.

One, I want to say that the judiciary presents a different face to GSA than they have before, because I want to make clear we have not abdicated our responsibility to build appropriate courthouses within the budget, and as much as we can, we have had a lot of conversations with the judiciary.

And I want to make a suggestion, because I think we are getting to an important point. The judiciary under the leadership of Judge Bataillon and now Judge Ponsor and the space committee have, I think, been much more realistic about prioritizing courthouses in the first place.

Second, I think they are much more open to looking at modern management and how we might do things differently. And so the suggestion I would make is that we look at actual data. I think Congressman Diaz-Balart suggested we see if we can make this work. Why don't we look at real data that we have on caseloads in different courthouses—I suspect we are going to find different answers in different places, and with different sizes of courthouses, and with different mixes of magistrate and bankruptcy and district judges—and then come up with some real data based on real facts that will tell us how and whether this could work, and what obstacles we would face if we went to a different kind of a policy.

I think it would be instructive. I suspect that we will validate some of the concerns that the Committee has typically had, and I think we will validate some of the concerns that the judges have had about the hardships. But I think we could come up with a research model and run data fairly quickly if we all got together and did it.

Ms. NORTON. Well, I am certainly with you, Mr. Peck, that the judiciary is far more open to change. We have not heard the kind of stonewalling about a kind of virtual Article III right to build courthouses here. We have heard none of that from our witnesses today. The witnesses are open to sharing.

I must say that I am dubious about your last suggestion. We are not going to customize courthouses based on docket, which changes from time to time.

And if you want some real-life experience, Mr. Peck, I want you to study what the Southern District has done. Look at—if you want to talk about somebody who has spent some of her—native Washingtonian, but spent some of the best years of her life in New York City, you want to talk about a courthouse that has complicated trials, that has a horrendous caseload, take that as a case in point and see if you can extrapolate from that. Because I can tell you right now, we are not going to be able to customize courthouses to dockets. There is no way to do that.

Now, if—when you read Mr.—have a chance to study the assumptions behind what Mr. Goldstein has done, if you have differences with it, it is there that you ought to start to make changes. But I find it amazing to think about dockets as a way of doing this. We have got to—if we are going to be efficient, there are some models that have got to take into account most of what we are talking about. And if I may say so, this is not the most complicated model that we deal with in the Congress.

So where you have differences, if you can, if you find a caseload isn't built in enough, even given the Southern District model where

they have had no delays, where they have had no backup, if you are not satisfied with that, fine. If you are not satisfied with Mr. Goldstein's model, fine. But I tell you one thing, the courts have come up with no model, nor has GSA. So let us at least compare apples to apples, models to models.

I am going to ask Mr. Diaz-Balart if he would finish.

Mr. DIAZ-BALART. I will be brief.

Let me also then, since this will be my final one as well, let me thank all of you. And I agree, we have not heard the stonewalling we have heard in the past. So it has been very refreshing, and I want to thank all of you for being here today. I think this has been very helpful.

Mr. Peck, your last recommendation, you know, Mr. Shuster pretty much did that 4 years ago. I thought that is what we did 4 years ago when he said we are not going to fund anything new until we have a study. We have a study. So I thought that is what already had been done. And I guess now it is your recommendation to do it again because we don't like the result of it or what? I thought that had already been done.

Mr. PECK. No, sir. I am much more on the—what I was trying to say was that we can take real-life data. We are talking about trying to come up with a model. That is what GAO is trying to do. And I was saying there is real-life data. We don't quite know what assumptions GAO used. We can use data in various courthouses and see what works, have it worked out with the courts on what they think is usable and doable, and come back to you with a suggestion on what works. I am not talking about customizing for every courthouse. I am talking about coming up with a model.

We need a policy. We need in GSA to have an agreement, because, as you can tell here, we catch the spears when there is disagreement over the policies. And we are tough, we can take it, but we would like everyone to have an agreed-upon policy as well.

Mr. DIAZ-BALART. I understand that. But I thought that is what was asked for 4 years ago; the FJAC then came up with the numbers, and then GAO used those numbers to come up with this. But I think it is already there, is my understanding.

Mr. PECK. Like I said, we don't know how GAO took those numbers and turned them into their model.

Mr. DIAZ-BALART. FJAC also did their part, is my understanding.

Mr. PECK. Thats right, they have. But I don't think what we ever came up with was the final analysis on what courtroom sharing could look like if you are talking about sharing beyond what the courts already have done.

Mr. DIAZ-BALART. Well, you have one model at least now. And I think what the Chairwoman is saying is we haven't gotten anything other than the GAO—thank God for them. But—all right. I just want to make sure that we are on the same page here.

Look, a couple issues. We have heard no stonewalling, and I think it has been refreshing. However, there are a couple things that make us pause. We keep going back to the L.A. model. That is like a bad penny that keeps turning up. And I understand there is obviously a lot of issues. L.A. is a huge area with huge issues. My understanding is that when there are issues of security, that there is I guess two now, they use the one that is newer that has,

my understanding, some very good security measures. And this Committee has never been shown any compelling reason why anything above that needs to be done.

I think it would be a step in the right direction to show that things are different, that we all—we all have learned our lessons, our collective lessons, that that one, frankly, just is looked at, and that reality hit; and that look at the security steps that have been taken with the newer of the two courthouses that are down there, and that that one just finally gets real. Number one.

Number two is it is not the only one. You know, there is the issue of, as was mentioned, the one in Pennsylvania. I guess now there is one in Redding. Now there is another small courthouse that was going to be put together and built in Pennsylvania, in, I guess, Lancaster, Pennsylvania.

You know, those things have to start—if we are serious about changing the way we do business, which we all have to do, you know, things like that have to, frankly, go away. They have to get real. They have to start—we need to start to see some serious changes in the way we have been doing business.

Judge PONSOR. Lancaster is a valid criticism.

Mr. DIAZ-BALART. Well, I think L.A.—by the way, I am sure there are some good ones and some bad ones. That is just life. I understand that. The reality is those that we know are bad—bad is not the right term. I mentioned to you about what words mean. I shouldn't say "bad." Ones that clearly are not the best way to spend taxpayers' money, those have to be corrected. They have to go away. They have to drop off the lists. And they shouldn't be around anymore. And I think that will show a lot of—that we are moving in the right direction.

So I want to thank you all for your testimony. It has been very helpful. I want to thank you all for being very open and allowing us to do the same thing, and appreciate your service. Thank you.

Ms. NORTON. Let me say we do have one model. I suggest everybody look at that model and try to see if there are changes should be made in that model, because I want to say this: We are not going through a whole set of hearings on different models. We are going to change this program by law.

So the kind of collaboration that would have everyone agree would be helpful to us, and if we don't get it, we are just going ahead anyway, because we have got to show in the Congress that we are taking care of this problem. This is one of the major construction projects or divisions of the GSA.

I have to ask a final question of Mr. Peck. Given the extent to which judiciary has been given the last word often on courthouses, is the GSA fully willing and able to again take charge of a major Federal construction program as mandated by law?

Mr. PECK. I would—first, I would not say that the judiciary has had the last word. But I think that we prove every day with the projects that we manage, the buildings we manage, the leases that we negotiate that we are a supremely competent public real estate agency, and that we certainly welcome the opportunity to work on the courthouses, and we welcome the opportunity with the Congress to put some bright policy parameters around this program and manage to them. We would welcome that. Yes, ma'am.

Ms. NORTON. And I do believe that the ball really is in our court. I think we have put GSA to a disadvantage, first of all, even within the executive branch, of dealing with peer agencies. Now, when they deal with another branch of government through administrations of all kinds, we have found GSA to be at a disadvantage. And we think the only way to correct that advantage, given the fact that this part of what the courts do has nothing to do with cases and controversies and has everything to do with what Mr. Peck just said—Mr. Peck and the GSA are experts in construction. They know how to do it. Judges don't know how to do it, aren't paid to know how to do it, and deal in the case in controversy business. They are absolutely indispensable advisers to GSA.

This Committee will hold GSA responsible for the final product. I want that understood. I think Mr. Peck is very experienced, knows how to do it. I believe that we have short-changed him and the GSA in not putting more teeth in the law, because we believe that judges will follow the law. And if the law makes clear that GSA, and only GSA, is accountable when it comes to construction, with the advice of the judiciary in language that cannot be gainsaid, if we make it clear, then I think we will straighten out part of this problem.

And we do intend to do this. We intend to change the law. And we believe that we put GSA at a disadvantage if we don't. And while we have had two very reasonable judges before us, they know well that others of their colleagues often see themselves as in charge of this process. And we think the only way to disabuse them is by something all judges respect, by law, and that is the change we intend to make.

Your testimony, the testimony of all four of you, has been extremely helpful to us. I hope you don't mistake, judges won't certainly, the kind of cross examination, if I may say so, that we do here. That is how we are trained to extract from our witnesses the best testimony that will get—the deeper the cross examination, the better the answer, because the witness will defend her or his view. And then it will make us understand whether we have—the question posed, in fact, reflects or does not reflect what the facts are.

So we have found you to be very good witnesses of great help to this committee, and you have given us a head start on what our part of the problem will be. We are especially—what our part of the mission is. And we are especially encouraged by the willingness of all four witnesses to work together to advise GSA and to advise this committee on how to proceed.

Thank you very much. And this hearing is adjourned.

[Whereupon, at 1:25 p.m., the Subcommittee was adjourned.]

Eleanor Holmes Norton

STATEMENT OF THE
HONORABLE ELEANOR HOLMES NORTON
"ELIMINATING WASTE AND MANAGING SPACE IN FEDERAL COURTHOUSES: GAO RECOMMENDATIONS ON COURTHOUSE CONSTRUCTION, COURTROOM SHARING AND ENFORCING CONGRESSIONALLY AUTHORIZED LIMITS ON SIZE AND COST."

MAY 25, 2010

Good morning and welcome to today's hearing on the Government Accountability Office's (GAO's) draft report entitled, "Eliminating Waste and Managing Space in Federal Courthouses: GAO Recommendations on Courthouse Construction, Courtroom Sharing and Enforcing Congressionally Authorized Limits on Size and Cost." We are pleased to have two federal judges with us this morning, the Honorable Michael Ponsor, Chair of the Judicial Conference Committee on Space and Facilities, and the Honorable Julie Robinson, Chair of the Judicial Conference's Court Administration and Case Management Committee, as well as the Honorable Robert Peck, Commissioner of the GSA Public Building Service, and Mark Goldstein, GAO Director of Physical Infrastructure. Today's hearing is one of several hearings that meet the oversight requirements under clauses 2(n), (o), and (p) of Rule XI of the Rules of the House of Representatives, which requires each subcommittee to have at least one hearing annually dedicated to providing oversight over waste, fraud, and abuse.

We convene this morning primarily to hear from GAO regarding a January 24, 2008 bipartisan request from the Committee on Transportation and Infrastructure that the GAO examine courthouse planning and construction, including the courthouse construction management and costs. The draft GAO report contains astonishing and serious findings about how the courthouse program has been managed and the amount of money that has been wasted. GAO determined that the 33 courthouses completed by GSA since 2000 include 3.56 million square feet of **extra** space, consisting of space that was constructed above the congressionally approved size; consistent overestimation of the number of judges that courthouses would be required to accommodate; and failure to implement courtroom sharing, despite the mandate of the committee. The total value of the unneeded extra space is $835 million in construction costs, and $51 million in annual costs in rent and operating expenses, according to GAO.

The amount of money that GAO reports was wasted in overbuilding alone demands address by Congress because GAO has calculated that it is equivalent to the cost of 9

additional mid-sized courthouses. As the nation is emerging from the greatest economic crisis of our generation, with unemployment currently at 9.9 percent, and a growing $12

trillion deficit, it is imperative that waste in federal spending be eliminated. The American taxpayer has no stomach for such waste when services are being cut and federal programs are being scaled down or eliminated across the country. Yet, criticism of the Federal Courthouse Construction program is neither new nor misunderstood. As far back as fifteen years ago this committee asked the Judicial Conference of the United States to address the issue of cost containment. The hesitance, indecision, and absence of resolve led to the draft GAO Report we are considering today.

The report cites three principal forms of waste in the Federal Courthouse Construction program: the construction of 1.7 million square feet in excess of congressional authorizations; of that number, the construction of 887,000 extra square feet was caused by overestimating the number of judges the courthouse would have in 10 years; and the construction of 946,000 square feet because of the lack of sharing in courthouses across the country.

Remarkably, a report prepared in 1996 by the Administrative Office of the U.S. Courts (AOUSC) at the direction of and for the Judicial Conference, entitled *Space Management Initiatives in the Federal Courts*, asked the judiciary to begin a process of courtroom sharing. A segment of the AOUSC report reads as follows:

> ***Courtroom Sharing.*** *The Congress has asked the judiciary to consider sharing courtrooms and to determine the impact on a judge's ability to try cases if courtroom sharing were implemented. The Court Administration and Case Management Committee, working in conjunction with other appropriate committees.....should be tasked by the Conference to determine what policy on courtroom sharing for active and senior judges should be adopted, and whether the impact of any delays that would result for sharing courtroom will adversely affect case processing."*

This was the same conversation we were having with GSA and AOUSC four years ago. However, only in the last two years has the Judicial Conference agreed to a very modest courtroom sharing policy for senior and magistrate judges. Consequently, today there are empty courtrooms across the country because of resistance to the congressional directive to share courtrooms whenever possible.

The GAO draft report states that the Judicial Conference also has consistently over-projected the number of judgeships and the number of senior judges that would be appointed 10 years from the point of courthouse design. For 28 of the 33 courthouses GAO studied, at least 10 years have elapsed since design. Of these 28 courthouses, **23** had extra courtrooms and ancillary space associated with empty courtrooms (e.g., jury deliberation rooms, attorney conference rooms, holding cells). For at least two of these courthouses, the number of judges required to be housed was overestimated by 10. Because approval of new Article III judgeships and judge appointments relies on a political process, we can appreciate the difficulty in making accurate predictions. However, with over-estimations of 887,000 square feet of wasted courthouse area, the committee intends to require the necessary expertise to account for probable growth, with sufficient accuracy to assure sound fiscal stewardship of the government's resources.

The Judicial Conference appears to have taken leadership of a major GSA construction program, rendering the Public Building Service of the GSA all but a nominal partner in the management of this program. According to GAO, of the 3.56 million square feet of wasted space, GSA is responsible for 1.7 million square feet of the overbuilt space, nearly half of the total, because the Public Building Service provided poor oversight of the design and construction process. This committee, in deliberate and careful review, examined each prospectus submitted by GSA and made an affirmative decision to authorize each of these courthouses by resolution at a certain square footage. Yet, GSA exceeded the limits of the committee resolutions in 27 of the 33 courthouses completed since 2000. In the case of the O'Connor Courthouse in Phoenix, Arizona and the Arnold Courthouse Annex in Little Rock, Arkansas, GSA overbuilt the courthouses by over 50%, creating several hundred thousand square feet of wasted space.

For some time now, GSA has considered not only courts, but federal agencies to be GSA's consumers rather than the American taxpayer. Time and time again over the past decade the agency has allowed the courts and federal agencies to redesign, re-assign, and re-think space decisions with apparently no thought of the financial consequences. The number of amended resolutions has grown steadily as has the cost of the court program.

Twice in the last six years, this subcommittee has heard testimony regarding the judiciary's inability to pay for its current and future space needs and the problems of the courthouse construction program. Today, the draft report from GAO finds that the Federal Courthouse Construction program has been undisciplined and out of the control of GSA, the agency charged by statute with administration of the program. In the 2005 hearing, the judiciary, as well as the GSA, committed to a series of actions each entity would undertake to control the courts' run-away rental costs. The committee did its part by asking the GAO to review how the courts budget for rent, how GSA accounts for the rent, and what impact the courts' rent relief request of nearly $500 million would have on the Federal Building Fund. GAO's review came in a June 2006 report (GAO-06-613) on courthouse rent increases and mismanagement, and contained findings of multiple instances of unused or underutilized courtrooms, chambers, and support spaces, that there is no criteria in the design guide to assign space to appeals courts (even after fifteen years of the committee requesting such criteria), and that some judges have exclusive access to facilities in multiple buildings.

In March 2004, the courts essentially imposed a two-year moratorium on courthouse construction because of the escalated rental costs. Also, in 2005, the judiciary's Space and Facilities Committee committed to reviewing the space standards in the *U.S. Courts Design Guide*, with an "emphasis on controlling costs". Further, Space and Facilities Committee began a revamping of its long-range facilities planning process to include "examining staff and judgeship growth as well as the space standard use for estimating square footage needs."

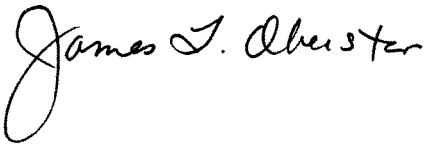
Although GSA knew that the judiciary had difficulty paying its rent bills, GAO reports that GSA overbuilt nine of the 33 courthouses **after** our 2006 hearing. At least three courthouses were more than 25% over the congressionally authorized limit, without any notification to this subcommittee, even after we made certain that both the AOUSC and GSA knew that we were deeply concerned about the issue of space, savings, and adherence to the committee's direction on cost containment. In effect, GSA, to some measure, turned a deaf ear not only to this committee's concerns, but also to the judiciary's concerns about

the inordinate rent costs associated with new courthouses. GSA "ran up the tab" with overbuilding, apparently oblivious to any hardship this might create for the judiciary in funding its burgeoning rent obligation to GSA.

Moreover, several of the courthouse prospectus requests submitted since that hearing still do not include courthroom sharing on the scale that this subcommittee has consistently required. In surprising disregard of the committee's mandates, nearly every courthouse has continued to have a one-to-one ratio of judges to courtrooms. The prospectus requests do not reflect the level of sharing that GAO now finds has been more than possible using the judiciary's own data produced by the Federal Judicial Center.

It is fair to ask where GSA has been throughout this process. Why did GSA not notify the authorizers that these problems were continuing even after our hearings when the judiciary continued to submit projects that were inconsistent with our direction? The conclusion is unavoidable that little, if any, progress has been made in controlling costs or managing the federal courthouse construction program after a decade of scrutiny. This subcommittee will withhold authorizing new additions to the courts' inventory until we are convinced that the Federal Courthouse Construction program is satisfactorily reformed. There will be courtroom sharing where it is appropriate, and every courthouse on the courts' Five Year Courthouse Project Plan will be reconsidered under new sharing guidelines. We do not plan to authorize any new courthouses without details on real savings and programs to control spending. We will need a list from GSA of all court projects that are currently appropriated and designed so they can be evaluated to ensure that they do not include the type of waste identified by the GAO in its draft report.

This subcommittee has a long history of bi-partisan, and actually non-partisan, action. Today, we will hear from all the parties and, in collaboration with them, we will begin a process of problem-solving reform of a major federal program. We intend to work with GSA and the courts to assure good asset management decisions on behalf of the American taxpayer. Legislation will be necessary, and we look forward to working with the minority towards a bi-partisan solution to ensure significant savings for the American taxpayer. We appreciate the testimony of each of our witnesses today and we welcome your thoughts and suggestions.



STATEMENT OF
THE HONORABLE JAMES L. OBERSTAR
SUBCOMMITTEE ON PUBLIC BUILDINGS, ECONOMIC DEVELOPMENT, AND EMERGENCY MANAGEMENT
HEARING ON "ELIMINATING WASTE AND MANAGING SPACE IN FEDERAL COURTHOUSES: GAO RECOMMENDATIONS ON COURTHOUSE CONSTRUCTION, COURTROOM SHARING AND ENFORCING CONGRESSIONALLY AUTHORIZED LIMITS ON SIZE AND COST"
MAY 25, 2010

Today, the Subcommittee continues its in-depth review of the Federal courthouse construction program by scheduling this hearing on Government Accountability Office (GAO) findings on overspending and waste in the courthouse construction program. GAO has identified three principal areas of concern:

1. Over-building by the General Services Administration (GSA), catalogued in the report as 1.7 million square feet of over-building in 33 courthouses constructed since 2000.

2. Over-projection by the Judiciary of the number of new judgeships that Congress would authorize, resulting in the construction of 887,000 unnecessary square feet for the 33 courthouses.

3. Over-building through the failure of the Judiciary to engage in courtroom sharing, resulting in the building of 946,000 unnecessary square feet for these same 33 courthouses.

GAO values this unnecessary space as a one-time waste of $835 million in terms of capital expense, and on an on-going annual waste of $11 million in terms of operating expenses and maintenance fees.

Since the GAO draft report catalogues the unnecessary square footage for only 33 of the 66 courthouses that have been constructed over the past 20 years, there is a

natural question as to whether, were the entire 66 courthouses studied, the purported waste would roughly **double**. However, it is important to note that, with respect to the courtroom-sharing calculations, GAO's numbers are based upon a retrospective application of sharing formulas that it has only recently developed, and which the Judiciary likely would have applied only after the 2007 study of courtroom use by the Federal Judicial Center. Therefore, in some respects, the calculation of the unnecessary construction due to the failure of the Judiciary to share courtrooms is an aggressive estimate: it reaches back in time to say what might have been, had people known then what they have only recently come to know. In addition, we have not yet heard testimony from the Judiciary as to their opinion of the GAO's recommended courtroom sharing formulas. The Judiciary may be able to present evidence that one or more of the formulas is inappropriate, and we reserve judgment on this point.

Nevertheless, I am deeply concerned overall that the courthouse construction program has not been administered well by GSA, and that the Judiciary has played a significant contributory role in the construction of courthouses that are larger than needed. Squandering funds by overbuilding projects is always a mistake, but to do so in an era when funding for GSA capital projects is severely constrained, begins to border on the outrageous. We have seen the GSA ratio of leased-to-owned space grow and grow over the past 30 years. More and more of the Federal Government's

general space needs are met through leasing. Leased space now constitutes the majority of GSA's space holdings, and the problem is only getting worse. This is a direct consequence of GSA not having enough money to build or buy structures to house the ever-growing space needs of the Federal Government. Over the past 15 years, GSA has been reduced to having the ability to build only courthouses, land ports of entry, and certain high-security facilities such as the Bureau of Alcohol, Tobacco, and Firearms Headquarters building in Northeast Washington. Even for these Federal clients with uniquely governmental needs, GSA is falling behind and cannot fund the growing backlog of necessary projects. Given this, it is all the more problematic that these courthouses were overbuilt, because had the buildings been constructed without the wasted space, more funding would have been available to satisfy other exigent needs.

I look forward to hearing from today's witnesses and the Committee's continuing efforts to eliminate waste and save taxpayer dollars.

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Economic Development, Public Buildings, and Emergency Management, Committee on Transportation and Infrastructure, House of Representatives

For Release on Delivery
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FEDERAL COURTHOUSE CONSTRUCTION

Preliminary Results Show Better Planning, Oversight, and Courtroom Sharing Could Help Control Future Costs

Statement of Mark L. Goldstein, Director
Physical Infrastructure Issues

GAO-10-753T

GAO
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Highlights

Highlights of GAO-10-753T, a testimony before the Subcommittee on Economic Development, Public Buildings, and Emergency Management, Committee on Transportation and Infrastructure, House of Representatives

Why GAO Did This Study

The federal judiciary and the General Services Administration (GSA) are in the midst of a multibillion-dollar courthouse construction initiative, which began in the early 1990s and has since faced rising construction costs. As requested, for 33 federal courthouses completed since 2000, GAO examined (1) whether they contain extra space and any costs related to it, (2) how their actual size compares with the congressionally authorized size, (3) how their space based on the judiciary's 10-year estimates of judges compares with the actual number of judges, and (4) whether the level of courtroom sharing supported by the judiciary's data could have changed the amount of space needed in these courthouses. GAO analyzed courthouse planning and use data, visited courthouses, modeled courtroom sharing scenarios, and interviewed judges, GSA officials, and other experts. The findings in this testimony are preliminary because the federal judiciary and GSA are still in the process of commenting on GAO's draft report and did not provide comments on this testimony.

What GAO Recommends

GAO developed draft recommendations related to GSA's oversight of construction projects and the judiciary's planning and sharing of courtrooms that GAO plans to finalize in its forthcoming report after fully considering agency comments.

View GAO-10-753T or key components. For more information, contact Mark L. Goldstein at (202) 512-2834 or goldsteinm@gao.gov.

May 25, 2010

FEDERAL COURTHOUSE CONSTRUCTION

Preliminary Results Show Better Planning, Oversight, and Courtroom Sharing Could Help Control Future Costs

What GAO Found

The 33 federal courthouses completed since 2000 include 3.56 million square feet of extra space—28 percent of the total 12.76 million square feet constructed. The extra square footage consists of space that was constructed (1) above the congressionally authorized size, (2) due to overestimating the number of judges the courthouses would have, and (3) without planning for courtroom sharing among judges. Overall, this space represents about 9 average-sized courthouses. The estimated cost to construct this extra space, when adjusted to 2010 dollars, is $835 million, and the annual cost to rent, operate and maintain it is $51 million.

Twenty seven of the 33 courthouses completed since 2000 exceed their congressionally authorized size by a total of 1.7 million square feet. Fifteen exceed their congressionally authorized size by more than 10 percent, and 12 of these 15 also had total project costs that exceeded the estimates provided to congressional committees—8 by less than 10 percent and 4 by 10 to 21 percent. There is no requirement to notify congressional committees about size overages, as is required for cost overages of more than 10 percent. A lack of oversight by GSA, including a lack of focus on not exceeding the congressionally authorized size, contributed to these size overages.

The judiciary overestimated the number of judges that would be located in 23 of 28 courthouses whose space planning occurred at least 10 years ago, causing them to be larger and costlier than necessary. Overall, the judiciary has 119, or approximately 26 percent, fewer judges than the 461 it estimated it would have. This leaves the 23 courthouses with extra courtrooms and chamber suites that, together, total approximately 887,000 square feet. A variety of factors contributed to the judiciary's overestimates, including inaccurate caseload projections and long-standing difficulties in obtaining new authorizations. However, the degree to which inaccurate caseload projections contributed to inaccurate judge estimates cannot be measured because the judiciary did not retain the historic caseload projections used in planning the courthouses.

Using the judiciary's data, GAO designed a model for courtroom sharing, which shows that there is enough unscheduled time for substantial courtroom sharing. Sharing could have reduced the number of courtrooms needed in courthouses built since 2000 by 126 courtrooms—about 40 percent of the total number—covering about 946,000 square feet. Some judges GAO consulted raised potential challenges to courtroom sharing, such as uncertainty about courtroom availability, but others indicated they overcame those challenges when necessary, and no trials were postponed. The judiciary has adopted policies for future sharing for senior and magistrate judges, but GAO's analysis shows that additional sharing opportunities are available. For example, GAO's courtroom sharing model shows that there is sufficient unscheduled time for 3 district judges to share 2 courtrooms and 3 senior judges to share 1 courtroom.

Madam Chairwoman, Ranking Member, and Members of the Subcommittee:

Thank you for the opportunity to testify before you today on the preliminary findings from our work related to the federal courthouse construction program. Since the early 1990s, the General Services Administration (GSA) and the federal judiciary (judiciary) have undertaken a multibillion-dollar courthouse construction initiative that has resulted in 66 new courthouses or annexes,[1] with 29 additional projects in various stages of development. However, rising costs and other federal budget priorities threaten to stall the initiative. Over the last 15 years, we have raised concerns about GSA's and the judiciary's process for planning new courthouses, including concerns over limited controls and oversight over courthouse construction costs.[2] We have also raised questions about the accuracy of the judiciary's long-term caseload projections—projections used to estimate the number of judges that will be located in new courthouses in 10 years, often under a policy that provided one courtroom for each estimated judge. Furthermore, we and some members of Congress have raised concerns that some courtrooms are underutilized; that more courtrooms than needed have been, and continue to be, constructed; and that increased courtroom sharing by judges—an option that the judiciary studied for district courtrooms in 2008[3]—could reduce the number of new courtrooms needed and therefore the size and cost of new courthouse projects. As a result of this study, the judiciary recently established some new policies that incorporate more sharing of courtrooms for senior judges[4] and magistrate judges.

[1]An annex is an addition to an existing building.

[2]See, for example, GAO, *Federal Courthouse Construction: More Disciplined Approach Would Reduce Costs and Provide for Better Decision-making*, GAO/T-GGD-96-19 (Washington, D.C.: Nov. 19, 1995) and GAO, *Courthouse Construction: Information on Project Cost and Size Changes Would Help to Enhance Oversight*, GAO-05-673 (Washington, D.C., June, 30, 2005).

[3]An independent and comprehensive study of courtroom use in district courts was conducted by the Federal Judicial Center (FJC) at the request of the Judicial Conference of the United States, which, after the study was completed, issued a report on the study. See Judicial Conference of the United States, *Report on the Usage of Federal District Court Courtrooms*, September 16, 2008. The study served as a basis for the Judicial Conference's adoption of several policy changes related to the sharing of courtrooms by judges, which are described later in this report.

[4]District judges who are eligible to retire may continue to hear cases on a full- or part-time basis as senior judges.

Today, my testimony will provide, for the 33 federal courthouses completed since 2000, preliminary results of our review of: (1) whether the courthouses contain extra space and any costs related to it, (2) how the actual size of the courthouses compares with the congressionally authorized size, (3) how courthouse space based on the judiciary's 10-year estimates of judges compares with the actual number of judges, and (4) whether the level of courtroom sharing supported by data from the judiciary's 2008 study of district courtroom sharing could have changed the amount of space needed in these courthouses. My statement is based on a draft report that is currently out for agency comment and scheduled to be released in June 2010. To address these objectives, we analyzed planning, construction, and budget documents associated with all 33 federal courthouses or major annexes completed from 2000 through March 2010. (See table 5 in appendix I.) In addition, we selected seven of the federal courthouses in our scope to analyze more closely as case studies.[5]

To estimate the cost of any extra courthouse space, we added together any extra square footage we found through our analysis in objectives (2) through (4). We then calculated the extra cost to construct, and rent or operate and maintain this space based on a methodology we validated with outside construction experts. To determine how the size of courthouses compares with the authorized size, we compared each courthouse's congressionally authorized gross square footage[6] with the gross square footage of the courthouse as measured by GSA's space measurement program. To learn how the judiciary's 10-year judge estimates compared with the actual number of authorized judges, we compared the number of judges the judiciary estimated it would have in

[5]The seven case study courthouses include the Bryant U.S. Courthouse Annex in Washington, D.C.; the Coyle U.S. Courthouse in Fresno, California; the D'Amato U.S. Courthouse in Central Islip, New York; the DeConcini U.S. Courthouse in Tucson, Arizona; the Eagleton U.S. Courthouse in St. Louis, Missouri; the Ferguson U.S. Courthouse in Miami, Florida; and the Limbaugh, Sr. U.S. Courthouse in Cape Girardeau, Missouri.

[6]Before Congress makes an appropriation for a proposed project, GSA submits to the House Committee on Transportation and Infrastructure and the Senate Committee on Environment and Public Works detailed project descriptions, called prospectuses, for authorization by these committees when the proposed construction, alteration, or acquisition of a building to be used as a public building exceeds a specified threshold. For purposes of this testimony, we refer to these committees as "authorizing committees" when discussing the submission of the prospectuses and providing additional information relating to prospectuses to these committees. Furthermore, for purposes of this report, we refer to approval of these projects by these committees as "congressional authorization." See 40 U.S.C. § 3307.

each courthouse in 10 years to judiciary data showing the number of judges or authorized vacancies located there. To learn more about the level of courtroom sharing that the judiciary's data support, we used the judiciary's 2008 district courtroom scheduling and use data to model courtroom sharing scenarios and convened a panel of judicial experts and judges about the challenges and opportunities related to courtroom sharing. We conducted this performance audit from September 2008 to May 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. A detailed discussion of our scope and methodology appears in appendix I. Our findings are preliminary because the federal judiciary and GSA are still in the process of commenting on GAO's draft report and did not provide comments on this testimony.

Background

Federal courthouses vary in size and scope. While typically, one to five district court judges are located in small- to medium-sized courthouses, in several large metropolitan areas, 15 or more district judges are located in a single courthouse. Courthouses may also include space for appellate, bankruptcy, and magistrate judges, as well as other tenants. There are 94 federal judicial districts—at least 1 for each state—organized into 12 regional circuits.[7]

The Administrative Office of the U.S. Courts is an agency within the judicial branch and serves as the central support entity for federal courts under the supervision of the Judicial Conference. The Judicial Conference of the United States, which serves as the judiciary's principal policy-making body, periodically assesses the need for additional judgeships for the nation's appellate, district, and bankruptcy courts and recommends additional judgeships to Congress, specifying the circuit or district for which the additional judgeship is requested.

[7]Each district has a court of appeals whose jurisdiction includes appeals from the district courts located within the circuit, as well as appeals from decisions of federal administrative agencies.

GSA and the judiciary plan new federal courthouses based on the judiciary's estimated 10-year space requirements, which are based on projections of each location's weighted filings.[8] It then uses this information to determine how many judges to plan for. Except for appeals court judges, who sit on panels of three or more, the judiciary requested one courtroom per estimated judge for courthouses built from 2000 through 2009, although it occasionally planned for senior judges to share courtrooms. The U.S. Courts Design Guide (Design Guide) specifies the judiciary's space and design standards for court-related elements of courthouse construction. In 1993, the judiciary also developed a space planning program called AnyCourt to determine the amount of court-related space the court will request for a new courthouse based on Design Guide standards and estimated staffing levels.

For courthouses that are selected for construction, GSA typically submits two detailed project descriptions, or prospectuses, for congressional authorization: one for site and design and the other for construction. These prospectuses outline the scope, size, and estimated costs of the project at each of the two project phases, and typically request authorization and funding to purchase the site and design the building in the site and design prospectus—and to construct the courthouse in the construction prospectus. Typically, the total gross square footage of the courthouses depicted in the construction prospectus or fact sheet is based on factors that include the judiciary's projected need for space, developed from 10-year judge estimates, and the gross square footage reserved for building common and other space, such as public lobbies and hallways, atriums, elevators, and mechanical rooms. The amount of gross square footage estimated for this space is based on GSA's specification that a courthouse should be 67 percent efficient, meaning that 67 percent of the total gross square footage, excluding parking, should consist of tenant

[8]Weighted filings statistics account for the different amounts of time district judges take to resolve various types of civil and criminal actions. Types of civil cases or criminal defendants that typically take an average amount of time to resolve each receive a weight of approximately 1.0; for more time-consuming cases, higher weights are assigned (e.g., a death-penalty habeas corpus case is assigned a weight of 12.89); and cases demanding relatively little time from judges receive lower weights (e.g., overpayment and recovery cases, such as a defaulted student loan case, are assigned a weight of 0.10).

space (space assigned to the courts and other tenants[9]) and the rest should be building common and other space.[10]

Congressional committees authorize and Congress appropriates funds for courthouse projects, often at both the design and construction phases. Congressional authorizations of courthouse projects typically include the gross square footage of the planned courthouse as described in the prospectus and the funding requested. After funds have been appropriated, GSA selects private-sector firms for the design and construction work through a competitive procurement process. GSA also manages the construction contract and oversees the work of the construction contractor.

After courthouses are occupied, GSA charges each tenant agency, including the judiciary, rent for the space it occupies and for its respective share of common areas, including mechanical spaces. GSA considers some space in buildings, such as vertical penetrations, including the upper floors of atriums, non-rentable space. In fiscal year 2009, the judiciary's rent payments totaled over $970 million. The judiciary has sought to reduce the payments through requests for rent exemptions from GSA and Congress and internal policy changes, such as annually capping rent growth and validating rental rates.

[9]For the purposes of this report, we are referring to space assigned both to a specific tenant and to joint use as tenant space.

[10]In line with GSA's method of calculating efficiency, this category includes the space GSA categorizes as building common, floor common, and unmarketable space.

Extra Space in Courthouses Cost an Estimated $835 Million in Constant 2010 Dollars to Construct and $51 Million Annually to Rent, Operate, and Maintain

The 33 federal courthouses completed since 2000 include 3.56 million square feet of extra space—28 percent of the total 12.76 million square feet constructed. The extra square footage consists of space that was constructed above the congressionally authorized size, due to overestimating the number of judges the courthouses would have, and without planning for courtroom sharing among judges.[11] Overall, this space represents about 9 average-sized courthouses. The estimated cost to construct this extra space, when adjusted to 2010 dollars, is $835 million,[12] and the annual cost to rent, operate, and maintain it is $51 million (see fig. 1). More specifically, the extra space and its causes are as follows:

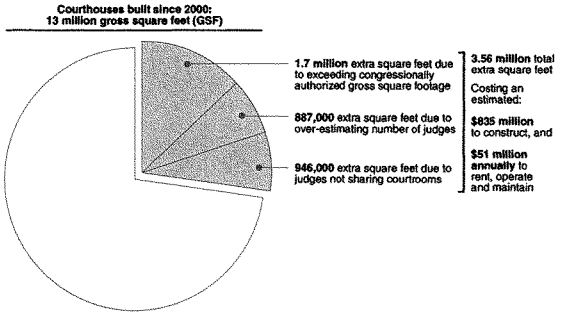
- 1.7 million square feet caused by construction in excess of congressional authorizations;
- 887,000 extra square feet caused by the judiciary overestimating the number of judges the courthouses would have in 10 years; and
- 946,000 extra square feet caused by district and magistrate judges not sharing courtrooms.

Thirty-two of the 33 courthouses include extra space attributable to at least one of these three causes and 19 have extra space attributable to all three causes.

[11]We did not evaluate how much of the extra space was unused.

[12]The estimated construction cost of the extra space was $640 million in nominal (unadjusted) dollars. We adjusted for inflation using a price index for construction costs from the Bureau of Economic Analysis and Global Insights. We adjusted expenditures to 2010 constant dollars.

Figure 1: Extra Federal Courthouse Space Constructed Since 2000 and the Estimated Construction and Annual Costs



Sources: GAO analysis of GSA data.

Note: Numbers in figure 1 do not add up to the total due to rounding.

In addition to the one-time construction cost increase, the extra square footage in these 32 courthouses causes higher annual operations and maintenance costs, which are largely passed on to the judiciary and other tenants as rent. According to our analysis of the judiciary's rent payments to GSA for these courthouses at fiscal year 2009 rental rates, the extra courtrooms and other judiciary space increase the judiciary's annual rent payments by $40 million. In addition, our analysis indicates that other extra space cost $11 million in fiscal year 2009 to operate and maintain.[13] Typically, operations and maintenance costs represent from 60 to 85 percent of the costs of a facility over its lifetime, while design and construction costs represent about 5 to 10 percent of these costs.[14]

[13]We did not attempt to calculate the rent attributable to the extra square footage due to exceeding congressionally authorized gross square footage because some of this extra square footage is for tenants other than the judiciary or occurs in building common or other space, the costs of which are not directly passed on to the judiciary in rent. We therefore calculated the annual operations and maintenance costs for all extra space due to exceeding congressionally authorized gross square footage and for the extra building common and other space due to overestimating the number of judges and judges not sharing courtrooms.

[14]The remaining lifetime costs include land acquisition, planning, renewal/revitalizations, and disposal.

Therefore, the ongoing operations and maintenance costs for the extra square footage are likely to total considerably more in the long run than the construction costs for this extra square footage.

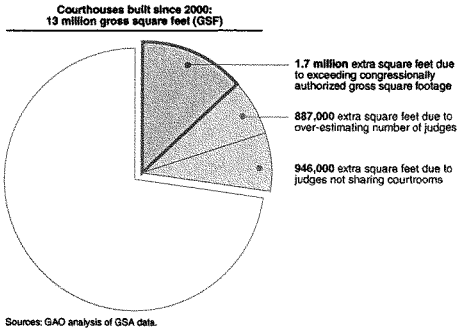
Most Courthouses Exceed Congressionally Authorized Size Due to a Lack of Oversight by GSA

Most Courthouses Constructed Since 2000 Exceed Authorized Size, Some by Substantial Amounts

Twenty seven of the 33 federal courthouses constructed since 2000 exceed their congressionally authorized size,[15] and 15 of the 33 courthouses exceed their congressionally authorized size by 10 percent or more. For example, the O'Connor Courthouse in Phoenix was congressionally authorized at 555,810 gross square feet but is 831,604 gross square feet, an increase of 50 percent. As shown in figure 2, altogether, these 27 courthouses have about 1.7 million more square feet than authorized.

[15]For all 33 courthouses in our scope, we used the congressionally authorized gross square footage for the construction of the courthouse. We compared the authorized gross square footage, including inside parking, with the actual gross square footage, including inside parking.

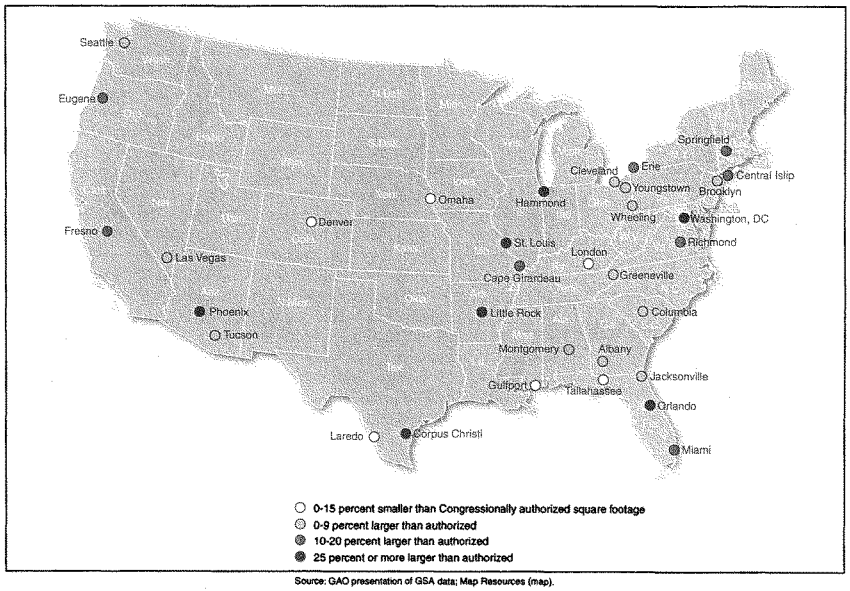
Figure 2: Extra Federal Courthouse Space Constructed Since 2000 Due to Exceeding Congressionally Authorized Square Footage



Sources: GAO analysis of GSA data.

On the other hand, as shown in figure 3, 6 of the 33 courthouses are smaller than congressionally authorized.

Figure 3: Percentage Difference in Size of Federal Courthouses as Congressionally Authorized and as Built



Source: GAO presentation of GSA data; Map Resources (map).

Twelve of the 15 courthouses that exceed the congressionally authorized gross square footage by 10 percent or more also had total project costs that exceeded the total project cost estimate provided to congressional authorizing committees.[16] The total project costs for 8 of these 12 courthouses increased by between 1 and 9 percent over the cost estimate

[16]Three of these 15 courthouses had total project costs that were at or slightly under the total project cost estimate provided to congressional authorizing committees at the construction phase.

provided to congressional authorizing committees at the construction phase, while the total project costs for four of these courthouses increased by between 10 and 21 percent over the cost estimate provided to congressional authorizing committees at the construction phase. While there is a statutory requirement that GSA obtain advance approval from the Committees on Appropriations if the expenditures for a project exceed the amount included in an approved prospectus by more than 10 percent,[17] there is no statutory requirement for GSA to notify congressional authorizing or appropriations committees if the size exceeds the congressionally authorized square footage. While GSA sought approval from the appropriations committees for the cost increases incurred for the 4 courthouses whose size and costs increased by about 10 percent or more, GSA did not explain to these committees that the courthouses were larger than authorized and therefore did not attribute any of the cost increase to this difference. For example, the total project cost of the Coyle U.S. Courthouse in Fresno, California, (about $133 million) was about $13 million over the estimate provided to congressional authorizing committees before construction (an increase of 11 percent), while the courthouse is about 16 percent larger than its authorized gross square footage. In requesting approval from the appropriations committees for additional funds for the Coyle U.S. Courthouse, GSA stated that, among other things, additional funds were needed for fireproofing and electrical and sewer line revisions—but did not mention that the courthouse was 16 percent larger than authorized. Because the construction costs of a building increase when its gross square footage increases, the cost overruns for this courthouse would have been smaller or might have been eliminated if GSA had built the courthouse to meet the authorized square footage.

All seven courthouses we examined as case studies had increases in size made up, at least in part, of increases in building common and other space.[18] Five of the seven courthouses also had increases in tenant space.

[17]See GSA's 2010 Fiscal Year Appropriations Act, Pub. L. No. 111-117, Div. C. Title V, 123 Stat. 3034, 3187-3188 (2009). Every year from fiscal year 1995 through fiscal year 2010, the GSA appropriations act has contained this requirement except for fiscal year 1998, when no appropriation was made for new construction or acquisition. For fiscal years 1990 through 1994, the GSA appropriations acts stated that these projects could not exceed their authorized cost by more than 10 percent.

[18]For the purposes of this report, we are using the term *building common and other space* to include GSA's categories of building common, floor common, and unmarketable space and the term *tenant space* to include GSA's categories of tenant space, joint use space, and vacant space.

In all seven of the case study courthouses, the increases in building common and other space were proportionally larger than the increases in tenant space, leading to a lower efficiency than GSA's target of 67 percent.[19] According to GSA officials, a building's efficiency is important because, as it declines, less of the building's space directly contributes to the tenants' mission-related activities.[20] In addition, for a given amount of tenant space, meeting the efficiency target helps control a courthouse's gross square footage and therefore its costs.[21] See table 1.

[19]In a building with 67 percent efficiency, 67 percent of the total gross square footage, excluding parking, consists of tenant space and the remainder consists of building common and other space.

[20]GSA defines the gross square footage of a building as the total constructed area of a building, which includes tenant spaces and building common and other spaces, such as lobbies and mechanical rooms—as well as indoor parking.

[21]According to GSA, the 67 percent efficiency target is intended for application to stand-alone new courthouses, and application to an annex is impractical because of the need for connections between the courthouse and the annex. However, we consider the efficiency of the Bryant Annex to be relevant because in the plans for this annex provided to congressional committees for authorization, GSA based its request for total gross square footage on an annex that would be 67 percent efficient.

Table 1: Square Footage Over Authorized and Efficiency of Seven Courthouses

	Bryant U.S. Courthouse Annex, Washington, D.C.	Coyle U.S. Courthouse, Fresno, Calif.	D'Amato U.S. Courthouse, Central Islip, N.Y.	DeConcini U.S. Courthouse, Tucson, Ariz.	Eagleton U.S. Courthouse, St. Louis, Mo.	Ferguson, Jr., U.S. Courthouse, Miami, Fla.	Limbaugh, Sr., U.S. Courthouse, Cape Girardeau, Mo.
Gross square footage over authorized	82,374	67,536	156,031	20,075	273,244	97,477	18,982
Actual gross square footage, including parking	409,974	495,912	1,014,031	439,817	1,310,876	605,800	173,392
Authorized gross square footage for construction, including parking	327,600	428,376	858,000	419,742	1,037,632	508,323	154,410
Actual tenant space square footage[a]	188,955 (38,722 over planned)[b]	278,654 (21,658 over planned)	416,827 (33,173 under planned)	255,225 (2,285 over planned)	671,050 (73,696 over planned)	366,924 (46,924 over planned)	96,025 (998 under planned)
Actual building common and other space square footage[a]	149,628 (75,633 over planned)[b]	173,157 (46,577 over planned)	468,411 (185,411 over planned)	148,015 (23,433 over planned)	518,006 (224,865 over planned)	188,766 (44,443 over planned)	68,008 (20,221 over planned)
Actual Efficiency	56 %	62 %	47 %	63 %	56 %	66 %	59 %

Source: GAO.

[a]The square footage for tenant space and building common and other space does not include indoor parking and thus does not add up to the actual gross square footage, which includes indoor parking.

[b]While the square footage to be used for tenant space and building common and other space is not specifically congressionally authorized, GSA provides congressional committees with plans it has developed with the judiciary that show how much of the gross square footage not including parking (which is congressionally authorized) is to be used for tenant space, with the rest of the square footage planned for building common and other space.

GSA Lacked Sufficient Oversight and Controls to Ensure That Courthouses Were Planned and Built According to Authorized Size

GSA lacked sufficient control activities to ensure that the 33 courthouses were constructed within the congressionally authorized gross square footage, initially because it had not established a consistent policy for how to measure gross square footage. GSA established a policy for measuring gross square footage by 2000, but has not ensured that this space measurement policy was understood and followed. Moreover, GSA has not demonstrated it is enforcing this policy because all 6 courthouses completed since 2007 exceed their congressionally authorized size. According to GSA officials, the agency did not focus on ensuring that the authorized gross square footage was met in the design and construction of

the courthouse until 2007, even though, according to GSA officials, controlling the gross square footage of a building is important to controlling its construction costs.

Lack of GSA Oversight Contributed to More Building Common Space Than Planned

All seven of the courthouses we examined in our case studies had increases in building common and other space—such as mechanical spaces and atriums—as compared with the square footage planned for these spaces within the congressionally authorized gross square footage. The percent increases over the planned space ranged from 19 percent to 102 percent. According to a GSA official, at times, courthouses were designed to meet various design goals without an attempt to limit the size of the building common or other space to the square footage allotted in the plans provided to congressional authorizing committees—and these spaces may have become larger to serve a design goal as a result. For example, the building common and other space in the Eagleton U.S. Courthouse in St. Louis is 77 percent larger than planned, and the courthouse has an efficiency of 56 percent. While we could not determine the cause of all of this additional space, all courtroom floors of the St. Louis courthouse have mechanical rooms near the courtrooms, and in total, the mechanical space in the St. Louis courthouse takes up proportionally more space than it does in the DeConcini U.S. Courthouse in Tucson, Arizona. In addition, the Eagleton U.S. Courthouse in St. Louis has two empty elevator shafts—rising all 33 floors—that were built but are not used. Together, the mechanical space and the elevator shafts bring the efficiency of the Eagleton U.S. Courthouse well below GSA's target of 67 percent and limit the proportion of the building's total space that contributes to mission-related activities. Moreover, regional GSA officials stated that they were unaware until we told them that the courthouse was larger and less efficient than authorized.

Another element of GSA's lack of oversight in this area was that GSA did not ensure that the architect followed GSA's policies for how to measure certain commonly included spaces, such as atriums. According to GSA officials, a primary reason why the Limbaugh, Sr., U.S. Courthouse in Cape Girardeau, Missouri, and the Bryant U.S. Courthouse Annex in Washington, D.C., exceeded their congressionally authorized square footage is that the architect did not consider the upper atrium levels as part of the gross square footage of the courthouse—in conflict with GSA's standards for measuring atrium space. In GSA's policy for determining a building's gross square footage, the atrium space is counted on all floors because multifloor atriums increase a building's volume and gross square footage and thus its costs. However, according to GSA officials, GSA's practice in the early 2000s—when the Limbaugh, Sr., and Bryant

Courthouses were under design—was to rely on the architect to measure and validate the plans for the courthouse, and GSA did not expect its regional or headquarters officials to monitor or check whether the architect was following GSA's policies. Although GSA officials emphasized that open space for atriums would not cost as much as space completely built out with floors, these officials also agreed that there are costs associated with constructing and operating atrium space. In fact, the 2007 edition of the Design Guide, which reflects an effort to impose tighter constraints on future space and facilities costs, emphasizes that courthouses should have no more than one atrium.

A Lack of GSA Oversight Contributed to Some Courthouses Being Built with Larger Tenant Spaces

GSA's lack of focus on meeting authorized square footage also contributed to increases in the size of tenant spaces in five of our seven case study courthouses. For example, the Ferguson, Jr., U.S. Courthouse in Miami has about 46,924 more square feet of tenant space than planned. The district court has about 20,768 more square feet of space in this courthouse than planned. Among other things, the 14 regular district courtrooms built in this courthouse are each about 2,800 square feet—17 percent larger than the Design Guide standard of 2,400 square feet—while the two special proceedings courtrooms on the 13th floor are each about 3,200 square feet, about 7 percent larger than the Design Guide standard of 3,000 square feet. GSA officials stated that courtroom space is among the most expensive of courthouse spaces to construct and the Design Guide's criteria are in part meant to help ensure that courthouses are built to be cost-effective as well as functional.

In addition, some courthouses encompass more courtroom space than planned because during the planning stages, neither the judiciary nor GSA took into account the possibility that the design of the courthouse could double the square footage attributable to each courtroom.[22] Courthouses have been designed in various ways to address the height requirement for courtroom ceilings. For example, in a collegial floor plan, courtroom floors alternate with floors for judicial chambers and other spaces that do not need higher ceilings, so that each floor can be built to a height that is suitable for the rooms it contains. However, because federal courthouses have typically been built with judges' chambers on the same floors as the

[22]Under the Design Guide standards in effect when these courthouses were designed, courtroom ceilings were to be at least 16 feet high, while judges' chambers and other court-related spaces did not have ceiling height requirements. The ceilings of special proceedings courtrooms and appellate *en banc* courtrooms (in which all the circuit's judges sit together on a panel and decide a case) were to be 18 feet high.

courtrooms, some courthouses have courtrooms on floors designed to hold rooms with 10-foot ceilings, and the ceiling of each courtroom is cut out so that each courtroom takes up two floors. For example, the Eagleton U.S. Courthouse in St. Louis and the Bryant U.S. Courthouse Annex in Washington, D.C., were constructed with courtrooms that span two floors. According to GSA's policy, when a courthouse is designed so that a courtroom takes up two floors, the space on the second floor—referred to as a tenant floor cut—is considered part of the gross square footage of the building and—if it would otherwise be usable space—is also considered to be court-occupied space. Therefore, in this type of courthouse, each courtroom is counted as having double the square footage of the courtroom floor. Although the extra square footage in this type of courtroom is multistory space, like the extra square footage in atriums, and therefore, according to GSA, costs less than square footage that is completely built out, nevertheless there are costs associated with this space.

Judiciary officials said that space planning is done well before they know if they will need to incorporate additional space for tenant floor cuts in courtrooms. Under the judiciary's current automated space planning tool, AnyCourt, which the judiciary uses to determine how much court-related space to request for a new courthouse, the Design Guide's standard of 2,400 square feet is provided for each district courtroom planned for a new courthouse. However, because the gross square footage requirements that GSA identifies in the prospectus to congressional committees are based on AnyCourt's output for the amount of space needed by the courts, for courthouses designed with district courtrooms that have tenant floor cuts, the AnyCourt program identifies only half of the square footage attributable to the courtroom when calculating the courthouse's gross square footage following GSA's standards. If GSA requests court space based on the AnyCourt model, it therefore may not be requesting sufficient space for courtrooms to account for courtrooms that are designed with tenant floor cuts.

Recently, GSA Has Taken Some Steps to Improve Oversight of Courthouse Size

Recently, GSA has taken some steps to improve its oversight of the courthouse construction process. In May 2009, GSA published a revised space assignment policy to clarify and emphasize its policies on counting the square footage of atriums and tenant floor cuts, among other things. In addition, according to GSA officials, GSA established a collaborative effort in 2008 between its Office of Design and Construction and its Real Estate Portfolio Management to, among other things, use data management software to ensure that GSA's space guidelines are followed in the early planning phases of courthouse projects. It is not yet clear whether these

steps will establish sufficient oversight to ensure that courthouses are planned and constructed within the congressionally authorized square footage.

Estimated Space Needs Exceeded Actual Space Needs, Resulting in Courthouses That Were Larger than Necessary

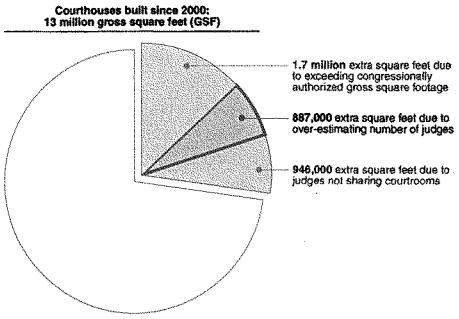
Because the Judiciary Overestimated the Number of Judges, Courthouses Have Much Extra Space After 10 Years

Our analysis of construction plans for the 33 courthouses built since 2000 shows that 28 have reached or passed their 10-year planning period[23] and 23 of those 28 courthouses have fewer judges than estimated.[24] Overall, the judiciary has 119, or approximately 26 percent, fewer judges than the 461 it estimated it would have. As a result, these 23 courthouses have extra courtrooms, chamber suites, and related support, building common, and other spaces covering approximately 887,000 square feet (see fig. 4).

[23]The judiciary makes the 10-year estimates during the planning stages of new courthouses and major annexes. We did not include 5 courthouses in this section because they have not yet reached the end of their 10-year planning period.

[24]Each of the five courthouses that met or exceeded their 10-year estimates for judges projected increases of zero or one judge for planning periods ending from 2004 to 2006.

Figure 4: Extra Federal Courthouse Space Constructed Since 2000 Due to Overestimating the Number of Judges



Sources: GAO analysis of GSA data.

Six of the seven case study courthouses we reviewed have reached the end of their 10-year planning period and were designed for more judges than they actually have.[25] Table 2 compares the estimated and actual numbers of judges for each of these courthouses and the space consequences of overestimating the number of judges.[26]

[25]The Limbaugh, Sr., Courthouse in Cape Girardeau, Missouri, is not included as a case study in this analysis because it has not reached the end of its 10-year planning period.

[26]Extra space includes courtroom suites, ranging in size from 3,500 to 5,000 square feet, and chamber suites, ranging in size from 1,500 to 2,400 square feet, as specified in the Design Guide. Courtroom space calculations include square footage for spaces that are necessary for courtroom use, such as soundlocks (an entryway designed to reduce sound), audiovisual storage space, and public waiting areas. Additional spaces associated with courtrooms vary by courtroom type and may include, among other things, coat closets, judges' conference rooms, judges' robing rooms, exhibit storage spaces, and offices for court reporters. In addition to the court space, these spaces require a proportional allocation of additional public and mechanical spaces, and judges are generally provided with secure, inside parking space in new courthouses. These additional spaces are also not needed if estimates exceed authorized judges.

Table 2: Comparison of 10-Year Judge Estimates and the Actual Number of Judges After 10 Years or More for Case Study Courthouse Locations and Related Space Consequences

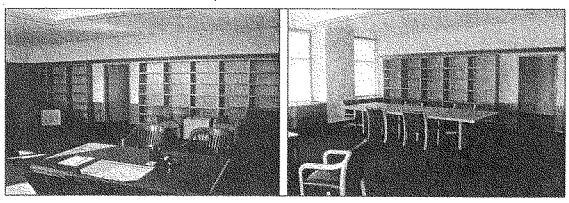
	Bryant U.S. Courthouse, Washington, D.C.	Coyle U.S. Courthouse, Fresno, Calif.	D'Amato U.S. Courthouse, Central Islip, N.Y.	DeConcini U.S. Courthouse, Tucson, Ariz.	Eagleton U.S. Courthouse, St. Louis, Mo.	Ferguson, Jr., U.S. Courthouse, Miami, Fla.
Year estimate was made	2000	2000	1995	1995	1994	2000
Ten-year judge estimate	49	18	25	15	29	33
Current judges including vacancies	39	10	15	12	20	27
Judges short of estimate	10	8	10	3	9	6
Estimated extra square footage built because of incorrect judge estimates	62,000	52,000	89,000	25,000	76,000	57,000

Source: GAO.

Note: Our analysis includes judges who are located in the new courthouse and authorized vacancies not covered by recalled judges.

Figure 5 illustrates two unassigned chamber suites in the Coyle Courthouse in Fresno, California.

Figure 5: Unassigned Chamber Suites in the Coyle Courthouse in Fresno, California



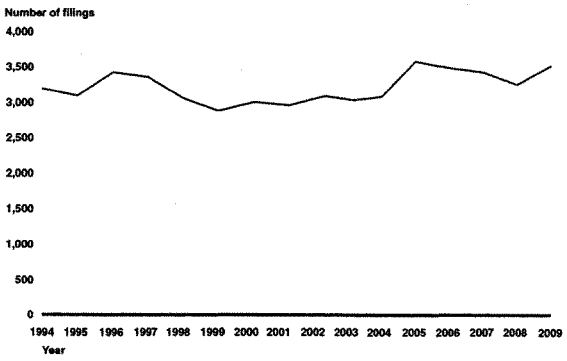
Source: GAO.

Judiciary Planning Overstated the Need for Space through Inaccurate Caseload Projections

Inaccurate caseload growth projections led the judiciary to estimate a need for more judges and subsequently overestimate the need for space for some courthouse projects. In a 1993 report, we questioned the reliability of the caseload projection process the judiciary used.[27] For this report, we were not able to determine the degree to which inaccurate caseload projections contributed to inaccurate judge estimates because the judiciary did not retain the historic caseload projections used in planning the courthouses. However, judiciary officials at three of our site visit courthouses indicated that the estimates used in planning for these courthouses inadvertently overstated the growth in district case filings and, hence, the need for additional judges. For example, for the Eagleton Courthouse in St. Louis, judiciary officials said the district estimated that it would need four additional district judges by 2004 to handle a high level of estimated growth in case filings; however, that case filing growth never materialized and the Eagleton Courthouse has the same number of authorized judges that it had in 1994 when the estimates were made. Specifically, the Eastern District of Missouri, in which the Eagleton Courthouse is located, had 3,182 case filings in 1994 and 3,241 case filings in 2008 (see fig. 6).

[27]GAO, *Federal Judiciary Space: Long-Range Planning Process Needs Revision*, GAO/GGD-93-132 (Washington, D.C.: Sept. 28, 1993).

Figure 6: Total District Court Case Filings for the Eastern District of Missouri



Source: Administrative Office of the U.S. Courts.

The Judiciary's Method of Estimating Judges Does Not Account for Uncertainty in How Many New Judgeships Will Be Authorized

Limitations of the judiciary's 10-year judge estimates are also due, in part, to the challenges associated with predicting how many judges will be located in a courthouse in 10 years leading the judiciary to overestimate how many judges it would have in courthouses after 10 years or more. Determining how many requested judgeships will be authorized is also challenging for several reasons. First, Congress has authorized fewer positions than the judiciary has requested over the years. It has been 20 years since Congress passed comprehensive judgeship legislation. Yet the judiciary did not incorporate historic trends into its planning for new courthouses. Instead, it requested new courthouses that could accommodate the number of judges it would have if all of its estimated judgeships were approved, and some of the excess space in new courthouses reflects the judiciary's receipt of fewer judgeships than it requested. Problems with the reliability of the weighted caseload data—the workload indicator that the judiciary uses to decide when a new judge is needed—can undermine the credibility of the judiciary's requests for new judgeships. For example, in a 2009 hearing, a member of Congress cited a lack of reliability in weighted caseload to question if all of the

requested judgeships are necessary. In a 2008 report, we found that weighted caseload is not reliable because its accuracy for district and appeals courts cannot be tested.[28]

A second challenge the judiciary faces in estimating how many judges it will need for specific courthouses is that judgeships are requested and thus authorized at the district or circuit levels as a whole, rather than for a specific courthouse. Hence, it is hard to predict which courthouses the additional judgeships requested in the Federal Judgeship Act of 2009,[29] if enacted, would be assigned to if the positions were authorized. However, the judiciary's estimation process does not take this uncertainty into account. For example, in 2009, the judiciary requested 18 judgeships for districts that contain courthouses built since 2000, but not all of the judges for these requested judgeships, if approved by Congress, would necessarily be placed in those courthouses.

Low Levels of Use Show That Judges Could Share Courtrooms, Reducing the Need for Future Courtrooms by More Than a Third

Most courthouses constructed since 2000 have enough courtrooms for all of the district and magistrate judges to have their own courtrooms. Using the judiciary's data,[30] we designed a model for courtroom sharing that shows that judges could share courtrooms at a high enough level to reduce the number of courtrooms needed in 27 of the 33 district courthouses built since 2000 by a total of 126 courtrooms—about 40 percent of the total number of district and magistrate courtrooms constructed since 2000.[31] In total, not building these courtrooms and their associated support, building common, and other spaces would have reduced construction by approximately 946,000 square feet[32] (see fig. 7).

[28]GAO, *Federal Judgeships: General Accuracy of District and Appellate Judgeship Case-Related Workload Measures*, GAO-08-928T (Washington, D.C.: June 17, 2008).

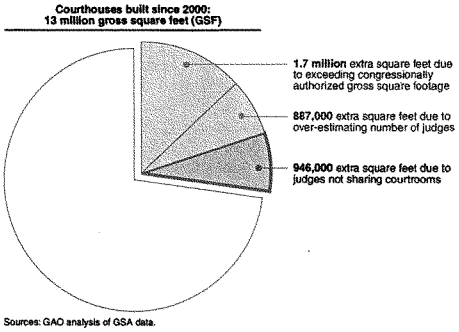
[29]H.R. 3662, 111th Cong. (2009) and S. 1653, 111th Cong. (2009).

[30]Federal Judicial Center, *The Use of Courtrooms in U.S. District Courts: A Report to the Judicial Conference Committee on Court Administration & Case Management* (Washington, D.C.: July 18, 2008).

[31]Our model does not reduce the number of courtrooms in six courthouses for the following reasons: four already had sharing between judges and the model did not find increased sharing possibilities and therefore imposed no reduction in courtrooms; one has only one district and one magistrate judge; and one courthouse has only bankruptcy judges and is out of our scope for district and magistrate sharing opportunities.

[32]This number also includes the support spaces directly related to a courtroom as applicable, such as jury rooms, evidence closets, and lawyer conference rooms.

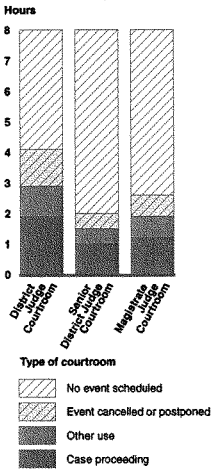
Figure 7: Extra Federal Courthouse Space Constructed Since 2000 Due to Judges Not Sharing Courtrooms



Sources: GAO analysis of GSA data.

According to the judiciary's data, courtrooms are used for case-related proceedings only a quarter of the available time or less, on average. Furthermore, no event was scheduled in courtrooms for half the time or more, on average. Figure 8 illustrates the average daily uses of courtrooms assigned to single district, senior district, or magistrate judges.

Figure 8: Representation of an Average 8-Hour Day for a Courtroom by Type of Judge as of July 2007



Source: GAO analysis of Judiciary data.

These low levels of courtroom usage are consistent across courthouses regardless of case filings. Specifically, the judiciary's data showed no correlation between the number of weighted and unweighted cases filed in a courthouse and the amount of time courtrooms are in use. Although the judiciary uses weighed case filings as the measurement criteria for requesting additional judgeships, this representation of higher levels of activity does not translate into higher courtroom usage rates, according to the judiciary's courtroom use data. According to the data, courthouses located on the nation's border and those with higher pending caseloads do make greater-than-average use of their courtrooms, but other courthouses in the same districts offset that higher use for district and senior district judges' courtrooms.

Based on the low levels of use indicated by the judiciary's data, we found that sharing is feasible in 27 of the 33 district courthouses built since 2000 and could have resulted in the construction of 126 fewer courtrooms—40 percent of all district and magistrate courtrooms in those courthouses.[33] The Design Guide in place when these courthouses were built encouraged judicial circuits to adopt courtroom-sharing policies for senior judges. However, most of the courthouses constructed since 2000 provided enough courtrooms for all district and magistrate judges to have their own courtrooms.

The 2008 study by the judiciary states that the data collected during the study could be used with computer modeling to determine how levels of use might translate into potential sharing opportunities for judges, but that such a determination was outside the scope of the study. As a result, we applied generally accepted modeling techniques to the judiciary's data to develop a computer model for sharing courtrooms. The model ensures sufficient courtroom time for (1) all case-related activities; (2) all time allotted to non-case-related activities, such as preparation time, ceremonies, and educational purposes; and (3) all events cancelled or postponed within a week of the event.

Under our model, the remainder of time remains unscheduled—approximately 18 percent of the time for district courtrooms and 22 percent of the time for magistrate courtrooms on average. In this way, our model includes substantial time when the courtroom is not in use for case proceedings. Some non-case related events could be held outside of normal business hours, and 60 percent of events are cancelled or postponed within 1 week of the event's original date, according to the judiciary's data. Not allocating time in the model for these purposes would create even more opportunity for sharing; however, we chose to include these data, keep the model conservative, and allow for unpredictability.

The judiciary's report also included a section of case studies based on in-depth interviews with judges at courthouses where judges share courtrooms. These interviews suggested that courtrooms can be shared in two ways: (1) dedicated sharing, in which judges are assigned to share specific courtrooms, and (2) centralized sharing, in which all courtrooms are available for assignment to any judge based on need. Our model shows

[33]Sharing was not possible in some courthouses because there were only one or two district and/or magistrate judges.

the following possibilities for dedicated courtroom sharing, with additional unscheduled time to spare. See table 3.

Table 3: Dedicated Courtroom-Sharing Possibilities Based on GAO Model

Judges	Dedicated courtrooms needed
3 district judges	2 district courtrooms
3 senior district judges	1 district courtroom
1 district and 1 senior judge	1 district courtroom
2 magistrate judges	1 magistrate courtroom

Source: GAO.

Our model shows that centralized sharing further improves efficiency by increasing the number of courtrooms each judge can access, whereas in dedicated sharing judges only use the shared courtroom assigned to them. We used the model to estimate how the courtrooms in one courthouse could be shared both ways. Specifically, to illustrate the increased efficiency of centralized sharing over dedicated sharing, we applied the two types of sharing to the current district and magistrate judges in the Ferguson Courthouse in Miami, Florida. Currently, the Ferguson Courthouse has 26 courtrooms for 26 judges, including 12 district judges, 3 senior district judges and 11 magistrate judges (two of whom are recalled). Under a dedicated sharing model, the Ferguson Courthouse could accommodate these judges in 15 courtrooms. Under a centralized sharing model, in which all district judges have access to all district judge courtrooms and all magistrate judges have access to all magistrate courtrooms, the number of needed courtrooms is reduced to 14. Table 4 shows the levels of sharing possible and the amount of space that could be eliminated for all of our seven case study courthouses through centralized sharing.

Table 4: District, Senior, and Magistrate Judge Courtroom Sharing That Could Occur in Selected Courthouses Based on the Judiciary's Data

Courthouses	Current number of courtrooms by type with one courtroom per judge	Number of courtrooms needed under centralized sharing	Number of extra courtrooms under centralized sharing	Square footage of extra courtroom and associated support and public spaces
Bryant Courthouse Annex, Washington, D.C.	District: 20 Magistrate: 3	District: 11 Magistrate: 2	10	74,000
Coyle Courthouse, Fresno, Calif.	District: 3 Magistrate: 4a	District: 2 Magistrate: 2	3	20,000
D'Amato Courthouse, Islip, N.Y.	Active District: 7 Magistrate: 4	District: 4 Magistrate: 2	5	35,000
DeConcini Courthouse, Tucson, Ariz.	Active District: 5 Magistrate: 7	District: 4 Magistrate: 3	5	33,000
Eagleton Courthouse, St. Louis, Mo.	Active District: 9 Magistrate: 6	District: 5 Magistrate: 3	7	49,000
Ferguson Courthouse, Miami, Fla.	Active District: 15 Magistrate: 11	District: 9 Magistrate: 5	12	83,000
Limbaugh, Sr., Courthouse, Cape Girardeau, Mo.	Active District: 2 Magistrate: 1	District: 1 Magistrate: 1	1	7,500

Source: GAO analysis of the judiciary's data.

[a]There are 5 magistrate judges in the Coyle Courthouse, including 1 vacancy, but only 4 courtrooms. The model was run for 5 magistrate judges, and the result was that there would need to be 2 magistrate courtrooms—eliminating the need for 2 magistrate courtrooms.

Some Judges Said They Could Overcome the Challenges to Courtroom Sharing

We solicited expert views on the challenges related to courtroom sharing through interviews with judges and court administrators on site visits to courts with sharing experience and assistance from the National Academy of Sciences in assembling a panel of judicial experts.[34] While some judges remained skeptical that courtroom sharing among district judges could work on a permanent basis, judges with experience in sharing courtrooms said that they overcame the challenges when necessary and trials were never postponed because of sharing.

The primary concern judges cited was the possibility that a courtroom might not be available. They stated that the certainty of having a courtroom available encourages involved parties to resolve cases more

[34]The panel consisted primarily of judges and included other judicial experts with experience in or knowledge of courtroom sharing. Judges who were chosen for the panel but were unable to take part in the live discussion were contacted separately, and semistructured interviews were conducted with them via telephone or in person.

quickly. They further noted that courtroom sharing could be a disservice to the public if it meant that an event had to be rescheduled for lack of a courtroom; in that case, defendants, attorneys, families and witnesses would also have to reschedule, costing the public time and money. To address the concern that a courtroom would not be available when needed, we programmed our model to provide more courtroom time than necessary to conduct court business. Most judges with experience sharing courtrooms agreed that court staff must work harder than in nonsharing arrangements to coordinate with judges and all involved parties to ensure that everyone is in the correct courtroom at the correct time, but that such coordination is possible as long as people remain flexible and the lines of communication remain open.

Another concern about sharing courtrooms was how the court would manage when judges have long trials. Judges noted that long trials present logistical challenges requiring substantial coordination and continuity, which could be difficult when sharing courtrooms. However, when the number of total trials is averaged across the total number of judges, each judge has approximately 15 trials per year, with the median trial lasting 1 or 2 days. Hence, it is highly unlikely that all judges in a courthouse will simultaneously have long trials. Also, a centralized sharing arrangement would allow for those who need a courtroom for multiple days to reserve one.

To address panelists' concern about sharing courtrooms between district and magistrate judges, which stems in part from differences in responsibilities that can affect courtroom design and could make formal courtroom sharing inappropriate, our model separated district and magistrate judges for sharing purposes, reducing the potential for sharing that could occur through cross scheduling in courthouses with both district and magistrate judges.

The Judiciary Has Taken Some Steps to Increase Sharing in Future Courthouse Projects

In 2008 and 2009, the Judicial Conference adopted sharing policies for future courthouses under which senior district and magistrate judges will share courtrooms at a rate of two judges per courtroom plus one additional duty courtroom for courthouses with more than two magistrate judges. Additionally, the conference recognized the greater efficiencies available in courthouses with many courtrooms and recommended that in courthouses with more than ten district judges, district judges also share. Our model's application of the judiciary's data shows that more sharing opportunities are available. Specifically, sharing between district judges could be increased by one-third in all but the largest courthouses by

having three district judges share two courtrooms in all-sized courthouses. Sharing between senior district judges could also be increased by having three senior judges—instead of two—share one courtroom. If implemented, these opportunities could further reduce the need for courtrooms, thereby decreasing the size of future courthouses.

To date, the Judicial Conference has made no recommendations for bankruptcy judges to share courtrooms. However, the judiciary is conducting a study for bankruptcy courtrooms similar to the 2008 district court study and expects to complete it in 2010.

Concluding Observations

While it is too late to reduce the extra space in the 33 courthouses constructed since 2000, for at least some of the 29 additional courthouse projects underway and for all future courthouse construction projects not yet begun, GSA and the judiciary have an opportunity to align their courthouse planning and construction with the judiciary's real need for space. Such changes would greatly reduce construction, operations and maintenance, and rent costs. We have draft recommendations related to GSA's oversight of courthouse construction projects and the judiciary's planning and sharing of courtrooms that we plan to finalize in our forthcoming report after fully considering agency comments.

Madam Chairwoman and members of the Subcommittee, this concludes my prepared statement. I would be pleased to respond to any questions that you or the other Members of the subcommittee may have.

If you or your staff have any questions concerning this report, please contact me on (202) 512-2834 or goldsteinm@gao.gov. Contact points for our offices of Congressional Relations and Public Affairs may be found on the last page of this testimony.

Contact and Acknowledgments

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Appendix I: Objectives, Scope, and Methodology

For the 33 federal courthouses completed since 2000, we examined (1) whether the courthouses contain extra space and any costs related to it, (2) how the actual size of the courthouses compares with the congressionally authorized size, (3) how courthouse space based on the judiciary's 10-year estimates of judges compares with the actual number of judges; and (4) whether the level of courtroom sharing supported by data from the judiciary's 2008 study of district courtroom sharing could have changed the amount of space needed in these courthouses. The 33 courthouses in our scope included the courthouses in table 5.

Table 5: The 33 Courthouses Completed from 2000 through March 2010

Year completed	Courthouse
2000	1. George U.S. Courthouse, Las Vegas, Nevada
	2. Eagleton U.S. Courthouse, St. Louis, Missouri
	3. D'Amato U.S. Courthouse, Central Islip, New York
	4. DeConcini U.S. Courthouse, Tucson, Arizona
	5. Hruska U.S. Courthouse, Omaha, Nebraska
	6. U.S. Courthouse Annex, Tallahassee, Florida
	7. O'Connor U.S. Courthouse, Phoenix, Arizona
2001	8. U.S. Courthouse, Corpus Christi, Texas
	9. Johnson U.S. Courthouse Annex, Montgomery, Alabama
	10. Quillen U.S. Courthouse, Greeneville, Tennessee
2002	11. U.S. Courthouse Annex, London, Kentucky
	12. U.S. Courthouse, Hammond, Indiana
	13. King U.S. Courthouse, Albany, Georgia
	14. Stokes U.S. Courthouse, Cleveland, Ohio
	15. Jones Federal Building & U.S. Courthouse, Youngstown, Ohio
	16. Simpson U.S. Courthouse, Jacksonville, Florida
2003	17. Arraj U.S. Courthouse, Denver, Colorado
	18. Perry, Jr., U.S. Courthouse, Columbia, South Carolina
2004	19. Russell, Jr., U.S. Courthouse, Gulfport, Mississippi
	20. Federal Building & U.S. Courthouse, Wheeling, West Virginia
	21. U.S. Courthouse Annex, Erie, Pennsylvania
	22. U.S. Courthouse, Laredo, Texas
	23. U.S. Courthouse, Seattle, Washington
2005	24. Coyle U.S. Courthouse, Fresno, California
2006	25. Bryant U.S. Courthouse Annex, Washington, D.C.
	26. Roosevelt U.S. Courthouse Annex, Brooklyn, New York
	27. Morse U.S. Courthouse, Eugene, Oregon

Year completed	Courthouse
2007	28. Arnold U.S. Courthouse Annex, Little Rock, Arkansas
	29. U.S. Courthouse Annex, Orlando, Florida
	30. Ferguson, Jr., U.S. Courthouse, Miami, Florida
	31. Limbaugh, Sr., U.S. Courthouse, Cape Girardeau, Missouri
2008	32. Robinson, III, and Merhige, Jr., U.S. Courthouse, Richmond, Virginia
	33. U.S. Courthouse, Springfield, Massachusetts

Source: GSA.

To meet all four objectives, for each of the 33 courthouses in our scope, we reviewed the site and design prospectuses, construction prospectus, and other relevant fact sheets and housing plans provided during the General Services Administration (GSA) to congressional authorizing committees to support the request, as well as the congressional authorizations provided at the construction phase of the project. To understand how much square footage is allocated to different types of courthouse space and the process for determining how much space is requested for a new courthouse, we reviewed the 1997 and 2007 editions of the judiciary's Design Guide and examples of the judiciary's space program model, AnyCourt, for those courthouse projects in our scope for which an AnyCourt model had been developed. We discussed verbally and in writing with GSA officials GSA's and the judiciary's processes for planning and constructing courthouses, and we requested and received written responses to questions related to the judiciary's process for determining its space needs. We also reviewed prior GAO work on courthouse construction and rent paid by the judiciary to GSA, and we researched relevant laws. Furthermore, to inform all four objectives, we selected 7 federal courthouses in our scope to analyze more closely as case studies. We chose the 7 case studies because they provided examples of courthouses that are larger than congressionally authorized. In addition, we chose these sites to represent a wide distribution of courthouse sizes, dates of completion, and geographical locations. Our analysis of courthouse size and cost is based on data for all courthouses and major annexes completed from 2000 through March 2010. The information specifically from our site visits cannot be generalized to that population. These case studies included the following courthouses: (1) Bryant U.S. Courthouse Annex in Washington, D.C.; (2) Coyle U.S. Courthouse in Fresno, California; (3) D'Amato U.S. Courthouse in Central Islip, New York; (4) DeConcini U.S. Courthouse in Tucson, Arizona; (5) Eagleton U.S. Courthouse in St. Louis, Missouri; (6) Ferguson, Jr., U.S. Courthouse in Miami, Florida; and (7) Limbaugh, Sr., U.S. Courthouse in Cape Girardeau, Missouri. For these courthouses, we analyzed blueprints labeled with size

and tenant allocations for each space, which we requested and received from GSA. For all of these courthouses except the DeConcini Courthouse in Tucson, we visited the courthouse, where we toured the facility and met with court officials, including judges, circuit executives, and others involved in planning for judicial space needs and requesting and using courthouse space; and we met with GSA officials involved in planning, constructing, and operating the courthouse. For the DeConcini Courthouse, we reviewed workpapers from a prior GAO engagement that included a December 2005 visit to the Tucson courthouse that involved a tour of the courthouse and discussions with court and GSA staff. During our meetings with court officials, we discussed issues pertaining to all four of our objectives, including the process for determining the size needed for the courthouse, the planning and construction of the courthouse, and the current uses of courthouse space, including courtrooms and chambers. We also sought the officials' views on the potential for more than one judge to share a courtroom.

In addition to these activities, we performed the following work related to each specific objective:

To determine whether the courthouses contain extra space and any costs related to it, we added together any extra square footage due to an increase in the courthouse's gross square footage over the congressional authorization, inaccurate judge estimates, and less sharing than is supported by the judiciary's data, as described below in the methodology for the other objectives. We consider the sum of the extra space as calculated according to the method described in our discussion of the following objectives to be the extra space for each courthouse. We then discussed how to calculate an order of magnitude estimate for the cost of increasing a courthouse's square footage with construction experts within GAO, at the Construction Institute of America, and at a private sector firm that specializes in developing cost estimates for the construction of buildings. Based on these conversations, we estimated the cost per square foot through the following method:

- To determine the total construction cost of each courthouse, we obtained from GSA the total net obligations, excluding claims, for each of the 33 courthouses through September 11, 2009, and determined that these data, which equal the total cost of each project as of September 11, 2009, were sufficiently reliable for our purposes through discussions with GSA officials and by reviewing information related to the reliability of these data from a previous GAO engagement. GSA officials told us that GSA could not break out the construction costs from the total costs of

courthouse projects. Therefore, except for most annexes, we then subtracted from the total project costs the estimates GSA had provided for site, design, and management and inspection costs in its construction prospectuses to congressional authorizing committees. We consider the resulting figure to be an estimate for the total construction cost for each courthouse.

- We then calculated the construction cost per square foot by dividing the construction cost of each courthouse, as calculated above, by the gross square footage, as measured using GSA's measurement program, ESmart, and reported by GSA, for each courthouse. For annex projects that involved substantial work on older buildings, we used a different method to determine the construction cost per square foot. GSA officials told us that for those annexes that involved substantial costs both to renovate an older building and to construct a new annex, they could not separate the costs of work done on the annex from the costs of any work done on the older building. Therefore, we used GSA's estimated cost per square foot for constructing the annex, which was reported in the construction prospectus, as our figure for the construction cost per square foot.

- We then reduced the construction cost per square foot of each courthouse or annex by 10 percent based on discussions with construction experts to account for the economies of scale that cause the construction cost per square foot to decrease slightly in larger buildings.

- We removed the effect of inflation from the estimates by applying two sources of information on annual increases in construction costs—the Bureau of Economic Analysis's Office Construction Series for years up through 2008 and the Global Insight Projections on Commercial Construction Costs for 2009 to the present based on each courthouse's completion date.

- Then, we multiplied the sum of the extra square footage by the construction cost per square foot for each courthouse to estimate the total construction cost implications for each courthouse.

To estimate the annual cost to rent or operate and maintain the extra space, we took the following steps. To the extent practical, we determined whether the cost of the extra space is directly passed on to the judiciary as rent. If the cost of the space is passed on to the judiciary as rent, such as for extra courtrooms, we calculated the annual rental costs for the space to the judiciary. To do so, we obtained information on the rent payments that the judiciary made to GSA for fiscal year 2009, which we determined was reliable for our purposes. Then, we multiplied the annual rent per

square foot for each courthouse by any extra square footage. If the costs of the space are not directly passed on to the judiciary as rent (including the costs of all the extra space, if any, due to construction above the congressional authorization, which we did not attempt to allocate between the judiciary, other tenants, and GSA), we calculated the annual operations and maintenance costs of the space. To do so, we obtained from GSA the total operations and maintenance costs for each of the 33 courthouses for fiscal year 2009 and determined that these data were sufficiently reliable for our purposes. For each courthouse, we divided these costs by the actual gross square footage to come up with an operations and maintenance cost per square foot. We then multiplied the cost per square foot by any extra square feet. Finally, we summed the extra operations and maintenance costs with the extra rent costs for all 33 courthouses built since 2000.

To determine how the actual size of the courthouses compares with the congressionally authorized size, we compared the congressionally authorized gross square footage of each courthouse with the gross square footage of the courthouse as measured by GSA's space measurement program, ESmart. We determined that these data were sufficiently reliable for our purposes through discussions with GSA officials on practices and procedures for entering data into ESmart, including GSA's efforts to ensure the reliability of these data. To determine the extent to which a courthouse that exceeded its authorized size by 10 percent or more had total project costs that exceeded the total project cost estimate provided to the congressional authorizing committees, we used the same information obtained from GSA on the total net obligations (i.e., total project costs), excluding claims, for each of these courthouses through September 11, 2009, as described above. We compared the total project cost for each courthouse to the total project cost estimate provided to the congressional authorizing committees in the construction prospectus or related fact sheets. We also examined GSA's communications to the committees on appropriations for four courthouses that we found exceeded the authorized size and estimated total budget by about 10 percent or more. To increase our understanding of how and why courthouse size exceeds congressional authorized size, we reviewed GSA's space measurement policy and guidance and discussed these documents with GSA officials. We also discussed the reasons that some courthouses are larger than congressionally authorized with GSA headquarters and regional officials and reviewed written comments on the size and space allocations for some of our case study courthouses. In addition, for two of the case study courthouses, we contracted with an engineer and architect to advise us on analyzing the extra space in these courthouses.

To determine how courthouse space based on the judiciary's 10-year estimates of number of judges compares with the actual number of judges, we used courthouse planning documents to determine how many judges the judiciary estimated it would have in each courthouse in 10 years. We then compared that estimate with the judiciary's data showing how many judges are located there including authorized vacancies identified for specific courthouses and interviewed judiciary officials. We determined that these data were sufficiently reliable for our purposes. To determine the effects of any differences, we calculated how much excess space exists in courthouses that were estimated to have more judges than are currently seated there at least 10 years after the 10-year estimates were made. We also discussed challenges associated with accurately estimating the number of judges in a courthouse with judicial officials and analyzed judiciary data where available.

To determine whether the level of courtroom sharing supported by data from the judiciary's 2008 study of district courtroom sharing could have changed the amount of space needed in these courthouses, we also took the following steps: We created a simulation model to determine the level of courtroom sharing supported by the data. The data used to create the simulation model for courtroom usage were collected by the Federal Judicial Center (FJC)—the research arm of the federal judiciary—for its *Report on the Usage of Federal District Court Courtrooms*, published in 2008. The data collected by FJC were a stratified random sample of federal court districts to ensure a nationally representative sample of courthouses—that is, FJC sampled from small, medium, and large districts, as well as districts with low, medium, and high weighted filings. Altogether, there were 23 randomly selected districts and 3 case study districts, which included 91 courthouses, 602 courtrooms, and every circuit except that of the District of Columbia. The data sample was taken in 3-month increments over a 6-month period in 2007 for a total of 63 federal workdays, by trained court staff who recorded all courtroom usage, including scheduled but unused time. These data were then verified against three independently recorded sources of data about courtroom usage. Specifically, the sample data were compared with JS-10 data routinely recorded for courtroom events conducted by district judges, MJSTAR data routinely recorded for courtroom events conducted by magistrate judges, and data collected by independent observers in a randomly selected subset of districts in the sample. We verified that these methods were reliable and empirically sound for use in simulation modeling.

To create a simulation model, we contracted for the services of a firm with expertise in discrete event simulations modeling. This engineering services and technology consulting firm uses advanced computer modeling and visualization as well as other techniques to maximize throughput, improve system flow, and reduce capital and operating expenses. Working with the contractor, we discussed assumptions made for the inputs of the model and verified the output with in-house data experts. We designed this sharing model in conjunction with a specialist in discrete event simulation and the company that designed the simulation software to ensure that the model conformed to generally accepted simulation modeling standards and was reasonable for the federal court system. The model was also verified with the creator of the software to ensure proper use and model specification. Simulation is widely used in modeling any system where there is competition for scarce resources. The goal of the model was to determine how many courtrooms are required for courtroom utilization rates similar to that recorded by FJC. This determination is based on data for all courtroom use time collected by FJC, including time when the courtroom was scheduled to be used but the event was cancelled within one week of the scheduled date.

The completed model allows, for each courthouse, user input of the number and types of judges and courtrooms, and the output states whether the utilization of the courtrooms exceeds the availability of the courtrooms in the long run. When using the model to determine the level of sharing possible at each courthouse based on scheduled courtroom availability on weekdays from 8 a.m. to 6 p.m., we established a baseline of one courtroom per judge to the extent that this sharing level exists at the 33 courthouses built since 2000. Then we inputted the number of judges from each courthouse and determined the smallest number of courtrooms needed for no backlog in court proceedings.

To understand judges' views on the potential for, and problems associated with, courtroom sharing, we contracted with the National Academy of Sciences to convene a panel of judicial experts. This panel, which consisted of seven federal judges, three state judges, one judicial officer, one attorney, and one law professor and scholar, discussed the challenges and limitations to courtroom sharing. Not all panelists invited were able to attend the live panel, and these panelists were individually contacted and interviewed separately. We also conducted structured interviews either in person or via telephone with 14 federal judges, 1 court staff member, 1 state judge, 2 D.C. Superior Court judges, 1 lawyer, and 1 academic, during which we discussed issues related to the challenges and opportunities associated with courtroom sharing. Additionally, we used

district courtroom scheduling and use data to model courtroom sharing scenarios. We determined that these courtroom data were sufficiently reliable for our purposes by analyzing the data, reviewing the data collection and validation methods, and interviewing staff who collected and analyzed the data. Besides the 7 courthouses we selected as case studies, we visited 2 district courthouses where courtroom sharing has been used—the Moynihan U.S. Courthouse in Manhattan, New York, and the Byrne U.S. Courthouse in Philadelphia, Pennsylvania. In addition, we visited the Roosevelt U.S. Courthouse Annex in Brooklyn, New York, as an example of a courthouse with a collegial floor plan.

We conducted this performance audit from September 2008 to May 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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GAO's Response to Questions for the Record for Mark Goldstein from the Hearing on May 25, 2010 Before the Subcommittee on Economic Development, Public Buildings, and Emergency Management, Committee on Transportation and Infrastructure, U.S. House of Representatives

1. **Please share your findings on what you term the "centralized sharing" model in writing with this subcommittee.**

GAO's Response: For modeling purposes, we developed two different courtroom sharing scenarios. In the first scenario, dedicated sharing, specific judges are assigned to specific courtrooms. In the second scenario, centralized sharing, all courtrooms are open to all judges, and significant efficiencies are gained. We have included the following tables to illustrate these efficiencies. The tables were prepared using our courthouse sharing model at your request for the hearing on May 25, 2010. They show the efficiencies gained through centralized sharing based on increases in the numbers of district judges, senior judges, and magistrate judges, respectively. The last table provides the results of our model for entire hypothetic courthouses, based on the nationwide ratios of district judges to senior and magistrate judges, when all judges have centralized access to all courtrooms. The tables illustrate the potential of courtroom sharing to reduce the number of courtrooms needed. It is up to the judiciary to determine how much sharing is possible as indicated in our recommendation.

Courtroom Sharing Table for District Judges Based on Centralized Sharing

Run	Number of district judges	Number of district courtrooms needed	Courtrooms per judge	Per-room utility (100% is full use)
1	3	2	0.67	89%
2	4	3	0.75	78%
3	5	4	0.80	74%
4	6	4	0.67	88%
5	7	5	0.71	84%
6	8	5	0.63	94%
7	9	6	0.67	89%
8	10	7	0.70	85%
9	11	7	0.64	92%
10	12	8	0.67	88%
11	13	8	0.62	95%
12	14	9	0.64	91%
13	15	10	0.67	89%
14	16	10	0.63	93%
15	17	11	0.65	91%
16	18	12	0.67	89%
17	19	12	0.63	93%
18	20	13	0.65	90%

Courtroom Sharing Table for Senior District Judges Based on Centralized Sharing

Run	Number of senior judges	Number of senior courtrooms needed	Courtrooms per judge	Per-room utility (100% is full use)
1	3	1	0.33	81%
2	4	2	0.50	52%
3	5	2	0.40	67%
4	6	2	0.33	81%
5	7	2	0.29	94%
6	8	3	0.38	72%
7	9	3	0.33	81%
8	10	3	0.30	91%
9	11	4	0.36	75%
10	12	4	0.33	82%
11	13	4	0.31	86%
12	14	4	0.29	95%
13	15	5	0.33	81%
14	16	5	0.31	86%
15	17	5	0.29	91%
16	18	6	0.33	80%
17	19	6	0.32	85%
18	20	6	0.30	90%

Courtroom Sharing Table for Magistrate Judges Based on Centralized Sharing

Run	Number of magistrate judges	Number of magistrate courtrooms needed	Courtrooms per judge	Per-room utility (100% is full use)
1	2	1	0.50	75%
2	3	2	0.67	55%
3	4	2	0.50	76%
4	5	2	0.40	92%
5	6	3	0.50	75%
6	7	3	0.43	86%
7	8	4	0.50	75%
8	9	4	0.44	85%
9	10	4	0.40	93%
10	11	5	0.45	83%
11	12	5	0.42	88%
12	13	6	0.46	79%
13	14	6	0.43	86%
14	15	6	0.40	92%
15	16	7	0.44	85%
16	17	7	0.41	89%
17	18	7	0.39	95%
18	18	8	0.44	83%
19	19	8	0.42	88%
20	20	8	0.40	93%

Courtroom Sharing Table for Courthouses Using Nationwide Ratio of District Judges to Senior and Magistrate Judges Based on Centralized Sharing

Run	District judges	Senior judges	Magistrate judges	Total judges	Number of district courtrooms needed	Courtrooms per judge	Per-room utility (100% is full use)
1	2	1	1	4	2	0.50	92%
2	3	1	2	6	3	0.50	93%
3	4	2	3	9	5	0.56	80%
4	5	2	4	11	6	0.55	82%
5	6	3	4	13	7	0.54	83%
6	7	3	5	15	8	0.53	84%
7	8	4	6	18	9	0.50	88%
8	9	4	7	20	10	0.50	89%
9	10	5	7	22	11	0.50	89%
10	11	5	8	24	12	0.50	90%
11	12	6	9	27	13	0.48	92%
12	13	6	10	29	14	0.48	92%
13	14	7	10	31	15	0.48	92%
14	15	7	11	33	16	0.48	92%
15	16	8	12	36	17	0.47	94%
16	17	8	13	38	18	0.47	95%
17	18	9	13	40	19	0.48	94%
18	19	9	14	42	20	0.48	94%
19	20	10	15	45	21	0.47	95%

2. During the hearing, the federal judiciary indicated that GAO mischaracterized the structure and content of its expert panel. Please explain.

GAO's Response: The judiciary has indicated that it believes we have mischaracterized the statements and sentiments of our expert panel. Chief Judge Loretta Preska, who we visited and participated in the 1-day portion of the panel, indicated this in a letter to us commenting on our related report.[1] Judge Preska was present for the 1-day portion of our panel, but not the subsequent interviews with experts that could not attend the 1-day panel. Our testimony reflected the accurate characterization of the panelists' views. We used an official transcript of the

[1] GAO, *Federal Courthouse Construction: Better Planning, Oversight, and Courtroom Sharing Needed to Address Future Costs,* GAO-10-417 (Washington, D.C.: June 21, 2010).

statements from the 1-day panel to support the facts in our report, and none of the experts at the 1-day session participated in the subsequent interviews.

3. **During the hearing, the judiciary indicated that the assumptions, or parameters, of the GAO courthouse sharing model were unclear. Are the parameters of the GAO model included in your report and testimony?**

GAO's Response: The testimony and report provide information about the parameters used to create the model in sufficient detail to replicate the model. Both a senior methodologist and the contractor hired to develop the model stated that the model could be replicated by an expert in discrete event simulation with the information included in the report.

4. **During the hearing, GSA disagreed with GAO's method for measuring gross square footage of courthouses. Please explain the differences.**

GAO's Response: GSA states that GAO assumes that upper space in building atriums is included in the gross square footage of an asset. This is true. We included this space in the gross square footage calculation because that is GSA's space measurement policy. Since at least August 2000, GSA's written policy has been and remains today to include all levels of atriums and tenant floor cuts in measuring the gross square footage of a building. In its testimony, GSA described the upper floors of atriums as "phantom floors" and stated that the incorporation of these spaces grossly inflates the gross square footage amounts for courthouses. These spaces are not phantom floors—they increase the volume and cost of buildings, and it is GSA—not GAO—that chose to count them as part of a building's gross square footage.

5. **During the hearing, there appeared to be disagreement between the federal judiciary and GAO on the authorized and actual size of the new courthouse in Springfield, Massachusetts. What is the authorized size and the actual size of that courthouse based on GSA space measurement policies?**

GAO's Response: Our testimony does not provide a precise figure for square footage of the Springfield courthouse other than including it as being 10-20 percent larger than authorized because it was not one of the 7 courthouses we selected as case studies. GSA appears to have calculated the overage for this courthouse as we did for the courthouses in our review by comparing the congressional authorization with the gross square footage measurement in GSA's ESmart database. GSA's calculation of the overage—17,299 gross square feet, or 11 percent more than authorized—includes the square footage of the upper levels of the atrium and tenant floor cuts, consistent with GSA's policy. Moreover, the total project cost of the Springfield Courthouse was about $65 million, more than 20 percent over the estimated total project cost of about $53 million provided to congressional committees. We did not fully analyze the reasons for cost overruns in the courthouses we reviewed, including the Springfield Courthouse. However, because a building's construction costs increase with its gross square footage, cost overruns for the Springfield Courthouse would likely have been reduced if it had been built with a smaller atrium or less void space. The extent to which GSA overbuilt the public and non-tenant spaces becomes clear through the efficiency rating. GSA specifies that 67 percent of the space in courthouses should be tenant spaces—or 67 percent efficient—but only 50 percent of the Springfield Courthouse is tenant space. In other words, half of the courthouse's space is dedicated to public circulation, mechanical, and other non-mission-related spaces.

ROBERT A. PECK
COMMISSIONER
PUBLIC BUILDINGS SERVICE
U.S. GENERAL SERVICES ADMINISTRATION

BEFORE THE

SUBCOMMITTEE ON ECONOMIC DEVELOPMENT
PUBLIC BUILDINGS AND EMERGENCY MANAGEMENT

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

"Eliminating Waste and Managing Space in Federal Courthouses: GAO Recommendations on Courthouse Construction, Courtroom Sharing and Enforcing Congressional Authorized Limits on Size and Cost"

May 25, 2010

Madam Chair and members of the Committee: I am Robert A. Peck, Commissioner of GSA's Public Buildings Service. As the steward of federally owned buildings and the government's landlord, GSA helps more than one hundred Federal agencies achieve their missions by constructing and renovating facilities that help them carry out their public missions productively and efficiently.

The Federal Courts play a critical role in the constitutional framework of American democracy. GSA is proud to build courthouses worthy of that role. Local, state and Federal courthouses are a traditional landmark, dating back to the founding of the nation. Federal courthouses must maintain the Judiciary's mission of ensuring fair and impartial administration of justice for all Americans while providing security for judges, jurors and others engaged in the judicial process.

GSA has developed a strong partnership with the Federal Judiciary. Since we began our Design Excellence program and the Congress began funding a nationwide program of courthouse renovation and construction approximately sixteen years ago, we have compiled a solid track record of delivering high quality buildings that support the Courts' unique needs while enhancing the buildings' surroundings. We do so within carefully considered design and budgetary guidelines and pursuant to Congressional authorization and appropriations.

Today's hearing focuses on a draft GAO report on Federal Courthouse Construction that asserts that GSA has constructed unnecessary courthouse space and exceeded Congressional authorization. The report is still a draft and this hearing is taking place before the end of the period in which agencies are customarily allowed to present preliminary comments and concerns.

Indeed, GSA has serious concerns with this draft report and takes exception to much of GAO's methodology and many of the report's conclusions. We welcome the opportunity to clarify and correct the information presented in this report, as much of this information is misleading:

- GAO has used a space measure that assumes upper space in building atriums is included in the gross square footage of an asset;
- GAO compounded this erroneous assumption by mistakenly ascribing normal operating and construction costs to these empty volumes; and
- GAO retroactively applies a methodology of "courtroom sharing" to buildings designed in some cases more than a decade ago predating the inclusion of sharing in the design guide and then claims that the buildings thus previously designed and built somehow violate this retroactive application of the standard.

Most egregiously, one reading the GAO report might assume that GSA has willfully neglected Congressional direction in the courthouse program. On the contrary, GSA has sought and followed regular Congressional authorizations and appropriation and has been subject to strict Congressional oversight of the program.

We built only courtrooms requested by the Judiciary and authorized by Congress. GSA has been forthright and transparent in all of our documents, testimony, and briefings to Congress throughout the history of our courthouse program.

GAO discusses overestimating judgeship projections in this report. GSA agrees that this issue warrants further review, since these projections have been overestimated in the past. However, GSA, the Judiciary, and Congress should discuss a realistic approach, while considering the court's increasing workload and the need for projections recognizing the length of time it takes to acquire funding and design and construct facilities.

History and Background of the Courthouse Program – The current courthouse construction program began at GSA in the early 1990s. GSA works closely with the Federal Judiciary to develop requirements to meet their needs. Since 1996, the Judiciary has used a 5-year plan to prioritize new courthouse construction projects. This plan takes into account the Court's projected need for space, projected growth in judgeships, and security concerns. GSA uses this plan to develop project requirements for the building program, size, and cost estimates. These requirements result in a request to Congress for authorizations and appropriations. Since the program's inception, 67 new courthouses or annexes have been constructed. Congress in total has appropriated and authorized approximately $7.5 billion for this program.

GSA has concerns over the draft GAO report. We dispute most of the significant findings in this draft report and we are in the process of responding to GAO. One of GSA's concerns with this report is GAO's methodology and the manner in which the auditors calculated extra space built and the associated cost to construct, operate, and maintain this space. GAO's assessment of these additional costs misleads Congress and the American public.

Measuring Space - When calculating the amount of extra space constructed in courthouses, GAO counted all of the square feet in the building, including tenant floor cuts and vertical floor penetrations[1] in multi-story atriums and double height courtrooms that are, in reality, "phantom floors". GAO used this phantom square

[1] Vertical floor penetrations are air space within a building created by the absence of a floor slab. Tenant floor cuts are the upper portion of a tenant space that expands into the floor above; if a floor were present in this upper area, it could be used for office space. This space could also be the upper air space of a double-height courtroom.

footage to calculate additional costs supposedly incurred to complete the building. GAO divided the total cost of the facility, including site costs, design fees and other soft costs, by the gross square footage (GSF) of the building. GAO then used this grossly inflated GSF number and multiplied it by the alleged amount of additional space GSA constructed to determine the cost of the alleged overbuilt space. These assertions and calculations are inaccurate and grossly misleading.

GAO assumes the cost to build and maintain tenant floor cuts and multi-story atriums costs the same as other building space, such as hallways, courtrooms, Marshals holding facilities, or general office space. This is an incorrect assumption and significantly overstates the cost of constructing and maintaining phantom floor space in a building. Obviously, a square foot of air inside an atrium costs less to build, maintain, and operate than a square foot of floor inside an office, courtroom or holding cell.

The cost of constructing phantom floors in an atrium or double height courtroom is only a fraction of the cost of constructing occupied space in the building. These phantom floors do not require slabs of concrete, nor do they have finishes like carpeting or wood paneling. The cost of maintaining and operating this type of space is less compared to the rest of the facility. For example, the O'Connor Courthouse in Phoenix, referenced in the report, has an atrium that is not air conditioned, so to assume these operating costs are the same as the space inside the building is inaccurate. This type of space also requires little cleaning, repair or maintenance which lowers the operating costs. This additional vertical space is only a small incremental cost increase to the facility's construction, not the glaring cost exaggeration in the GAO report.

Alleged Cost Overruns – GAO also suggests that cost overruns were a direct result of constructing this additional 1.7 million square feet of space. The increases in construction costs were primarily due to unprecedented increases in construction costs during GAO's audited time period. This phenomenal cost growth was well documented and was due to an industry worldwide building boom that resulted in acute material and labor shortages.

The Construction Cost Index, as published annually by RS Means, reflects a cumulative escalation of 58 percent from October 1, 2000 to October 1, 2008. GSA prepares cost information years in advance of actual construction. The budget inflation factors used to project future costs simply did not keep pace with the real inflation happening across the globe. This was a common occurrence across industry and was not a lack of planning foresight on the part of GSA. This too is well documented. This industry cost increase, not the design and layout of the courthouses, was the major driver for the increase in construction costs.

In addition to the unprecedented increase in construction costs, during the period covered by the audit, the U.S. was attacked by both domestic and international

terrorism. As a result of those attacks, both our building designs and projects under construction received a tremendous increase in security requirements which had a direct impact on construction costs and the resultant cost increases associated with our projects.

Congressional Authorization of Additional Space – GAO asserts that 27 out of the 33 Federal courthouses built since 2000 are larger than authorized by Congress. GSA disagrees with GAO's claim that this additional space contributes considerably to the increase in project costs since approximately 50 percent of the supposedly additional 1.7 million square footage cited in this report is due to vertical floor penetrations associated with atriums, according to GSA's estimates. As mentioned previously, this additional void space costs less to construct and maintain.

Reasons for the remaining 50 percent of the alleged 1.7 million square feet above authorized amount can be attributed to:

1) Site limitations and restrictions, such as site configurations and grading, can result in less than optimal building construction, resulting in design responses that provide less than optimal layout for space.
2) Constructing connections for the annexes. One third of the audited projects were annexes connected to existing buildings; and
3) New requirements not included in the space programming due to new design standards, such as LEED and security requirements, as well as expanding customer requirements.

GAO also suggests that GSA should notify Congressional authorizing and appropriation committees if the size of a courthouse exceeds the Congressional authorized GSF. GSA will notify the appropriate Congressional committees when the square footage increase exceeds 10 percent above the maximum identified in the prospectus. It is also worth noting that we always ensure our projects stay within the statutory 10 percent of the appropriated and authorized funding level or notify Congress accordingly. We have multiple levels of management and system controls to ensure costs do not exceed this threshold, without Congressional approval and will ensure we have the same for square footage increases.

When the original GSF is exceeded, GSA often has pressing and logical reasons for doing so. For example, during design, architects can develop more energy-efficient methods, such as creating atriums or light wells to bring natural light into interior windowless space within the building that could increase the building's total square footage. GSA will ensure that Congress is notified of these increases in the future, along with the rationale for the increase.

In estimating the cost of this additional space, GAO applies current GSA policy retroactively in its analysis. Although GSA adopted the American National Standards Institute and the Building Owners and Managers Association (BOMA)

measurement standards in 1997, GSA did not establish formal national guidance to include atrium space in the gross area calculation until fiscal year 2005. The 33 courthouse projects under review by GAO were authorized prior to this policy, so applying this policy retroactively inflates the gross area of the building during the time of the projects.

As discussed in 2009 in the BOMA publication of *The Gross Areas of a Building: Methods of Measurement*, current industry standards exclude atrium space in the gross square foot calculation. If GAO were to apply this BOMA standard or analyze the 33 projects in context prior to the issuance of the formal GSA guidance in 2005, the atrium voids would be excluded from the gross square feet, resulting in more than a 50 percent decrease in square footage above authorized prospectus. Courthouses such as Greeneville, Laredo, Wheeling, Springfield and Richmond would be at or below the square footage allowed under the authorized prospectus by approximately 10,000 – 20,000 square feet. The drawing below in Exhibit 1 shows an example of a typical courthouse, highlighting the atrium space circled in red. This diagram shows the significant amount of space atriums typically account for in a courthouse.

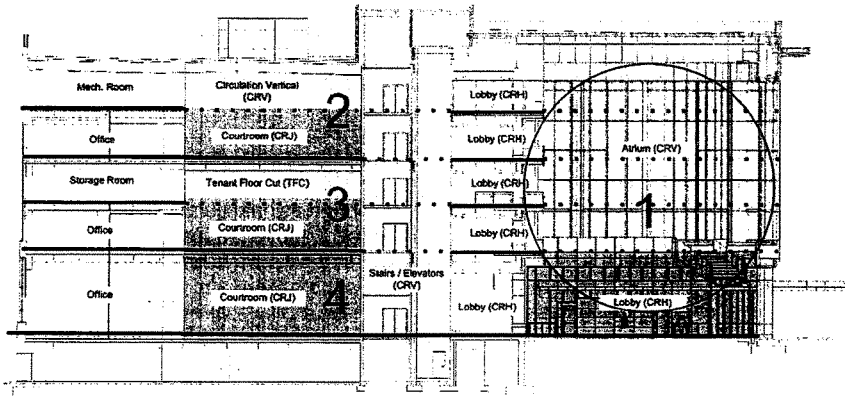

Exhibit 1 – Diagram of a typical courthouse with atrium voided space.

Oversight and Controls – GAO asserts that GSA needs additional oversight and controls over the management of our courthouse program. GSA has previously implemented this additional oversight and control. Policies are in place that require GSA's Central Office and the Regions, during the design process, to approve the facilities' measurements and ensure they are in line with the appropriation and authorization. Additionally, we have measurement experts, who provide an independent evaluation of the design. This evaluation is done during the development of design. Compliance with the prospectus building size is necessary to proceed with the project. GSA continues to educate our project

teams on these policies and ensure our measurement experts are involved throughout the project's phases to continually review the design and ensure the size remains within the authorized amount.

Courtroom Sharing – GSA works closely with the Judiciary to develop their courthouse requirements. The Judiciary has developed and implemented policies that require courtrooms to be shared among judges. We commend the Courts for developing these new courtroom sharing models, which were developed in recent years.

GAO audited courthouses that were designed and in some cases built before the Judiciary and GSA implemented the sharing models. The current sharing requirement, included initially in the 2007 design guide, requires one courtroom for every two senior judges. In 2009, it was updated further to require one courtroom for every two magistrate judges. The Judiciary and GSA also implemented additional sharing policies that were included for the first time under American Recovery and Reinvestment Act projects that there should be no more than one courtroom for every two district judges, who are within 10 years from their senior eligibility date. Additionally, GSA makes every effort to more fully utilize any vacant space in a courthouse. It is important to note that GAO's findings in the draft report were based on projects that were designed years before the sharing models were implemented. GSA and the Judiciary are committed to the courtrooms sharing policies for new courthouse projects with future planned designs.

This concludes my testimony. I appreciate the opportunity to discuss this draft report and clarify the assumptions and misleading statements made in this report. Thank you for inviting me to appear before you today and I am happy to answer any of your questions.

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE MICHAEL A. PONSOR
CHAIRMAN, COMMITTEE ON SPACE AND FACILITIES

BEFORE

THE SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS AND EMERGENCY MANAGEMENT

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"ELIMINATING WASTE AND MANAGING SPACE IN FEDERAL COURTHOUSES: GAO RECOMMENDATIONS ON COURTHOUSE CONSTRUCTION, COURTROOM SHARING, AND ENFORCING CONGRESSIONALLY AUTHORIZED LIMITS ON SIZE AND COST"

May 25, 2010

STATEMENT OF
HONORABLE MICHAEL A. PONSOR, CHAIR
COMMITTEE ON SPACE AND FACILITIES OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON
ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY
MANAGEMENT

MAY 25, 2010

Introduction

Good morning, Madam Chair, and members of the Subcommittee. I am Michael A. Ponsor, a District Judge of the United States District Court in Massachusetts, and Chair of the Judicial Conference's Committee on Space and Facilities. Also accompanying me here today is Judge Julie A. Robinson, a District Judge from the District of Kansas. Judge Robinson is the Chair of the Judicial Conference's Committee on Court Administration and Case Management. The Committee she represents here today has assisted the Judicial Conference with the development of policy on courtroom sharing arrangements. I appreciate the opportunity to appear before the Subcommittee today to discuss the Government Accountability Office (GAO) draft report on Federal Courthouse Construction and efforts made by the Judiciary to manage the costs of the courthouse construction program.

Before addressing these issues, however, I want to convey the Judiciary's appreciation to this Subcommittee for the courthouses that have been authorized over the years, which include the courthouse in Springfield, where I work. These buildings provide secure places with adequate space to administer justice and ultimately, provide a valuable service to the public.

The GAO's draft report focuses on courthouses that were built and occupied between 2000 and 2010, and addresses three main topics: space measurement; space projections; and a courtroom sharing model. My testimony will primarily focus on space planning processes and

efforts to control space costs. Judge Robinson will address courtroom sharing, and it is my understanding that Mr. Robert A. Peck, the Commissioner of Public Buildings of the General Services Administration, will give testimony that focuses on space measurement and issues about square footage limitations in authorizing resolutions.

Evolution of the Planning Process

By way of background, the Judiciary was one of the first entities in government to establish a systematic approach to space and facilities planning. It has continued to improve and refine its space planning process as more data are gathered and analyzed. The judiciary has been open to suggestions and improvements made by outside entities about the process, including those made by the GAO and private sector consultants.

Predicting what will happen in the future is, to say the least, challenging, and the GAO has recognized these challenges. The GAO made six key planning recommendations in its 1993 report titled *Federal Judiciary Space: Long-Range Planning Process Needs Revision* (GAO/GGD-93-132, Sept. 28, 1993). The report noted that:

> GAO recognizes that it is difficult to project future space needs with precision. The projection of such needs is not an exact science, and in the final analysis, it is reasonable to expect some variation between the estimate and what is actually needed. Space estimates are particularly challenging for the judiciary because there are numerous factors that cause changes in the workload, and therefore space needs, which are beyond its control.

This sentiment has been repeated in the current 2010 GAO draft report:

> Limitations of the judiciary's 10-year judge estimates are also due, in part, to the challenges associated with predicting how many judges will be located in a courthouse in 10 years. Such challenges include predicting when judges will take senior status, how many requested judges will be authorized [by Congress], and where newly authorized judges will be seated.

In an updated progress report dated January 25, 2001, which was provided to the Chairman of this Committee at the time, the GAO reported that, of all six recommendations made about space planning projections, the Judiciary had fully implemented five of them and partially implemented the remaining one. Specifically, the Judiciary now: 1) limits the time covered for space projections for courthouse requirements to 10 years; 2) uses standard statistical forecasting techniques to generate caseload projections with defined confidence intervals; 3) verifies local personnel forecasts with national statistical projections; 4) accounts for case complexity in addition to caseload; 5) uses baselines for existing space based on the *U.S. Courts Design Guide* and the relationships between caseloads, staff needs, and space requirements; and 6) prepares updated space plans for all districts (partially implemented – the Judiciary established a goal to update the plans every 3-5 years, but with the introduction of a new planning methodology, the goal has not yet been met for some districts).

Additional Efforts to Improve the Planning Process and Contain Costs

Aside from implementing GAO's recommendations about planning and its associated statistical methodology, the Judiciary has implemented other improvements, including those recommended in a 2000 Ernst and Young study of the Judiciary's space and facilities program,

such as using more advanced statistical techniques to forecast caseloads. Some of the improvements that have been made include use of multiple forecasting methods, review of the accuracy of the prior year's forecasts, and re-instituting the on-site planning sessions in each district and comprehensive facility evaluations of each courthouse. These program changes have been discussed with GAO staff in the past. Furthermore, and perhaps most dramatically, the Judiciary stopped its space planning process entirely in 2004 so that it could, once again, re-evaluate its planning methodology with a view on cost-containment. The Judicial Conference, the Judiciary's policymaking body, determined that the long-range planning process should be modified to ensure that the courts with the most urgent space needs were highlighted. The courts now employ a new asset management planning methodology to assess facilities needs on a go-forward basis.

Several other cost-containment controls have also been approved by the Judicial Conference. Additional space cost controls involving the approval of deviations from our space standards, a new policy that places more control over contractors designing courthouses during the requirements development phase so that new courthouse projects do not exceed the amount of space requested in a prospectus document, and the implementation of courtroom sharing policies for magistrate judges and senior district judges have also been approved by the Judicial Conference.

Determining the Appropriate Size of a Building is Challenging

It can take upwards of 15-20 years from the time of initial planning to occupancy of new federal courthouses. During that time circumstances change: judgeship bills are not passed when anticipated, judges do not take senior status when planned, and judges retire or die. In addition,

caseloads can fluctuate, prosecutorial policies change, and federal jurisdiction can expand – all impacting the workload of the federal courts. But once the decision is made to size a building based on a certain set of assumptions, it becomes very difficult and costly to change course mid-stream. To do so results in expensive change orders and a building that is not likely to meet longer-term needs. In my project in Springfield, it took more than ten years to get all the necessary approvals, and to design, construct, and occupy the building.

The draft GAO report asserts that many courthouses have not been fully occupied and it suggests that what it then deems to be "excess" space constitutes a waste of funding. There are several reasons to question the validity of these conclusions. One key question concerns the number of courtrooms and judges in these facilities. We are in the process of analyzing facts for the 33 buildings identified by GAO and we have found that in more than half of these buildings, the number of courtrooms is either equal to the number of judges in the building, or will be equal to or be very close to the number of judges to be housed in the building once vacancies are filled and required new judgeships are approved. It also appears from the draft report that GAO did not always take into account congressionally authorized vacant judgeship positions in its analysis. The building sizes authorized by this Committee assumed that vacant, congressionally authorized judgeship positions would be filled at these locations, that senior district judges and magistrate judges would not be sharing courtrooms, and that space would be provided for future new judgeship positions. It is more appropriate to apply the planning policies in place *at the time* to determine whether we met or came close to our projections. Undoubtedly, we will occupy a courthouse for many decades. Our revised analysis will give the Committee a more accurate view of how planned space relates to existing conditions at selected locations.

As the GAO notes in its draft report, there are locations where we did not meet our projections. Several of these buildings were planned at the inception of our planning process – a process that has evolved over time. With the adoption of courtroom sharing policies for senior district judges and magistrate judges approved by the Judicial Conference in 2008 and 2009, many of these locations will now be able to support the operations of the Judiciary and the U.S. Marshals Service well beyond the initially planned 10-year time frame. To say that the space is "extra" because of incorrect judge estimates, as noted by GAO in its draft report, is misleading. The space will be needed at some point in the near future. For example, it may not be needed until the 12th year or the 14th year from the time design of the building started, but it will be needed.

Planning for New Judgeships

The draft GAO report recognizes the challenges faced by space planners doing projections, such as projections of determining additional new judgeships. The Judicial Conference examines the need for new judgeships biannually and adjusts the recommendations based on current need and current caseload. Working collaboratively with the courts involved, assumptions are made about when judges will take senior status, and where new judgeships will be located. Not to plan for these projected judgeships would mean that a judge would potentially not have a place to work which could therefore impact the timely administration of justice.

This was the situation for many years when Congress regularly enacted new judgeship legislation. In fact, up until 1990, Congress had passed comprehensive judgeship legislation about every six years, including 1978, 1984, and 1990. While Congress has not passed comprehensive judgeship legislation in recent years, small groups of judgeships have been approved during this

time. We are hopeful that the current House and Senate judgeship bills that reflect the Conference's recommendations will be passed.

The draft GAO report criticizes the Judiciary for continuing to plan for space for these judgeships – however, if Congress had enacted our request, as they had historically done, and we had *not* planned chambers and courtrooms for these judges, there would have been a critical shortfall of space around the country. Nevertheless, we believe that on a go-forward basis, working with the Committee and its staff, assumptions about new judgeships and when judges might take senior status can be addressed. But because it can take such a long time for buildings to be planned, funded, designed, constructed and occupied, there is, of course, no guarantee that assumptions based on current, shorter-term circumstances and trends will always accurately predict future space needs.

Visiting Judges

I would also note that the GAO draft report mischaracterizes space provided for visiting judges by stating that it is a way of building "extra" space. In smaller courts with few judges, it is not unusual to have all the Article III judges recuse themselves because of a connection or conflict with one of the parties. In other courts, judges are assigned from other districts or circuits to assist with a surge in workload. And, in some courts, judges travel from one division within a district to another because there are not enough judges at any one location to handle the caseload. When these circumstances exist, smaller chambers and sometimes a courtroom dedicated to use by visiting judges is provided. Characterizing this space as "extra" space because it is not assigned to a specific judge demonstrates a fundamental misunderstanding of how the judicial system operates at some locations. We will provide more detailed comments about this aspect of the draft

report in our formal comments.

Conclusion

Over the past two decades, this Committee has supported efforts to build courthouses that facilitate the effective administration of our judicial system. They provide space to handle cases at locations along the southwest border where courts handle a significant and growing percent of the criminal cases nationally. In many cases, the buildings have played an important role in urban economic redevelopment. And, they provide a secure environment in which to handle our caseload because they are designed to mitigate security risks, as evidenced in the shootings and resultant deaths that took place in the new Seattle courthouse and more recently, in the new Las Vegas courthouse. The design of the lobby in the courthouses at those locations did what it was supposed to do, and these incidents were contained to the lobby and atrium area. These design features no doubt saved the lives of members of the public and those who work in the buildings.

Courthouses, like any substantial federally constructed buildings, are designed and built to last for many years. A courthouse is a fixed resource – if it is not built with sufficient space to house the judges and staff necessary to dispense justice, it is difficult and costly to add space once the building is complete. Without precise knowledge of future events, planning can only be done based on the best information that exists during the planning period. We would be happy to discuss with the Committee innovative ways of accommodating future growth, including projected new judgeships. We do strongly believe, however, that because of the inability of real property to easily expand or contract as circumstances change, the capacity for future growth needs to be included in a new courthouse. Budgetary constraints are likely to preclude adding annexes to buildings that are too small within ten years from the time the design of the new

building started, which is the current planning assumption. When capacity is not provided in the building, costly leased space – the most expensive space alternative – must then be obtained, which poses security risks and results in significant operational inefficiencies.

Madam Chair and members of the Subcommittee, thank you again for the opportunity to address the space requirements of the federal Judiciary. The Judiciary and the GSA will continue to work collaboratively with each other and with this Committee as we plan new court facilities with an emphasis on cost and function. We understand that with competing needs, limited budgets, and other priorities, we must use limited resources wisely. I would also ask that our formal response to GAO's draft report, which will be sent to GAO by June 1, 2010, be included with this statement as part of the hearing record.

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE JULIE A. ROBINSON
CHAIRMAN, COMMITTEE ON COURT ADMINISTRATION
AND CASE MANAGEMENT

BEFORE

THE SUBCOMMITTEE ON ECONOMIC DEVELOPMENT,
PUBLIC BUILDINGS AND EMERGENCY MANAGEMENT

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

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"ELIMINATING WASTE AND MANAGING SPACE IN FEDERAL COURTHOUSES: GAO RECOMMENDATIONS ON COURTHOUSE CONSTRUCTION, COURTROOM SHARING, AND ENFORCING CONGRESSIONALLY AUTHORIZED LIMITS ON SIZE AND COST"

May 25, 2010

STATEMENT OF JUDGE JULIE A. ROBINSON
CHAIR OF THE COURT ADMINISTRATION AND CASE MANAGEMENT COMMITTEE OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
May 25, 2010

Introduction

Madam Chair, and members of the Committee, my name is Julie A. Robinson. I am a United States District Judge in the District of Kansas. Since 2005, I have also been a member of the Court Administration and Case Management Committee of the Judicial Conference, and last October I took over from Judge John Tunheim as its chair. I have been asked to testify today regarding our Committee's work in developing the Judicial Conference's new courtroom sharing policies, as well as to share the views of the Judiciary regarding the recent draft report from the Government Accountability Office (GAO) on the planning and construction of court facilities.

CACM Involvement

At the outset, I would like to address the obvious question as to why our Committee – which, as its name suggests, deals with court administration and case management issues – is involved in any aspect of courthouse planning and construction. And indeed, our Committee's role in this area is limited and well-defined. The primary responsibility of our Committee is to ensure the "just, speedy, and inexpensive determination" of cases, as required by Rule 1 of the Federal Rules of Civil Procedure. Because the availability of a courtroom is one of the Judiciary's most important tools in

meeting this goal, the Judicial Conference asked our Committee – rather than its Space and Facilities Committee – to develop an appropriate sharing policy for the federal courts. Our job was to develop a courtroom sharing policy that balances the Judiciary's duty to be good stewards of the taxpayers' money with our primary responsibility to ensure case dockets are handled in an expeditious and effective manner. Given this limited role, my testimony pertains exclusively to the sharing policy, and not the other issues involving the planning and construction of court facilities.

Our Committee's work on the current sharing policy began five years ago when Congressman Shuster, then chairman of this Subcommittee, requested the Judicial Conference to conduct a study of courtroom usage. Congressman Shuster outlined three elements of the study: that it document how often courtrooms are actually in use (i.e., there are people in the courtroom for official functions) based on a statistically significant sampling of courthouses; that it be designed with the input of the GAO; and that it incorporate other factors that the Judiciary deemed necessary.

The Judicial Conference agreed to conduct the study, and asked our Committee to take the lead in its development and evaluation. After receiving this assignment, our Committee decided to request the Federal Judicial Center (FJC) – an independent judicial branch agency that provides research and educational services – to conduct the study. The Center agreed to conduct the study independently of the Judicial Conference and the Administrative Office, with our Committee serving only as a liaison among the Center, the courts, and Congress. I understand that my predecessor, Judge John Tunheim from

Minnesota, met several times with both staff and members of this Subcommittee (including you, Madam Chair) to brief you on the progress of the study, as well as the development of new sharing policies.

In August 2006, the FJC selected, through a computerized random draw, 24 courts and three case study districts that included large, medium, and small districts. (As was originally requested by Congressman Shuster, the FJC methodology for analyzing the empirical data was provided to the GAO for its review.) Data were collected in two three-month-long time periods (January to April 2007 and April to July 2007). A second component of the study was a questionnaire sent in the summer of 2007 to all district, senior and magistrate judges regarding their views on and experiences with courtroom usage, interviews with judges in the case study districts regarding courtroom sharing, and a questionnaire for attorneys who practice in federal district courts seeking their views on how courtroom sharing would affect their cases and their clients.

The final FJC report were based primarily on the empirical results of its data collection in the sample courtrooms. The study's results and findings were both comprehensive and complex. The assessment of the results and findings to determine appropriate policies requires careful consideration by those with expertise in the judicial process and this effort was undertaken by the Committee.

Committee Evaluation of the FJC Study

The findings of the FJC study served as the basis for our Committee's

recommendations for significant changes to the Judiciary's courtroom allocation policies. In evaluating the study, however, the Committee noted a number of limitations inherent to this type of research. First, although lengthy and comprehensive, the FJC study's findings provide courtroom usage statistics in national averages which do not represent the activity in any given court: for every underutilized courtroom, another is experiencing heavy usage. Second, the Committee noted that many courthouses were built in a different era, when demographics supported the facilities, but may be no longer fully active. (Although these facilities may still provide important links to the federal Judiciary and the national government.) These situations do not, however, negate the need for courtrooms in other locations, and the FJC's averages may have little applicability to a specific courthouse project. A third limitation noted by the judges on our Committee – who have to deal with the vagaries of courtroom scheduling on a daily basis – was that the FJC study only presented courtroom usage over three months for each wave of courts studied, and may not have provided a complete picture of courtroom usage. For example, several members of the Committee thought it important to emphasize that the data did not include cases from "Operation Streamline," a major initiative that has dramatically increased immigration enforcement efforts, and has had a huge impact on the caseloads of the five federal judicial districts located on the southwest border. Each of these examples point to the need for caution in applying national standards to local projects.

Balancing Appropriate Courtroom Sharing with Efficient Case Management

In spite of these concerns, the Committee agreed that it could recommend

significant changes to the "one to one" courtroom allocation policy that had been a mainstay of the Judiciary. Obviously there was a significant amount of institutional resistance to these recommendations, which centered on the close link between the availability of a courtroom and managing cases in a fair and efficient manner. I want to emphasize that this view – which the Committee heard over and over again – was not expressed from possessive judges, claiming a territorial right to a courtroom. Rather it stemmed from dedicated judges who take very seriously their Constitutional duty to try cases fairly and expeditiously.

Judges – because they are in the courtroom day in and day out – uniquely understand the implications of sharing policies. They see how the efficient, or inefficient, delivery of justice effects every party and attorney involved in federal litigation – from a personal bankruptcy case to a major criminal trial. They understand that the availability of a courtroom encourages parties to settle cases to avoid the risk and expense of a trial. They are acutely aware that for criminal trials, the uncertainty of access to a courtroom would hinder criminal prosecutions, run afoul of time limitations established under the Speedy Trial Act, raise security concerns, and possibly impact the resources of other agencies by making the transportation and delivery of defendants more complicated and uncertain. For these reasons many judges argue that the advantages of certainty, efficiency, and cost savings gained far outweigh the cost of additional courtrooms.

I should also note that cost and delay in litigation is also an important issue for Congress. For example, the Civil Justice Reform Act of 1990 required all district courts

to implement plans to reduce civil litigation delays, and commissioned an independent and comprehensive study of civil litigation practices, which served as the basis for substantial changes in the civil litigation process in the federal courts. This high level of case management required by the CJRA has, however, imposed other costs that are borne by the Judiciary, including immediate and certain access to a courtroom.

For all these reasons, our Committee spent a great deal of time and effort in developing the appropriate balance of meaningful courtroom sharing policies with effective and efficient case management. The effort included the comprehensive FJC study (as well as the ongoing bankruptcy study), conversations with lawyers and litigants, negotiations with several Judicial Conference Committees, and consultations with this House Subcommittee. Ultimately, the Committee recommended, and the Judicial Conference adopted, several significant policy changes that included: a policy to provide one courtroom for every two senior judges, and a policy to provide one courtroom for every two magistrate judges. In addition, a courtroom usage study of bankruptcy courts is currently underway and after a determination is made regarding the bankruptcy courts, my committee will consider a courtroom sharing policy for courthouses with more than ten active district judges. I want to emphasize again that these are major changes to the courtroom allocation policies for the federal Judiciary, which were made only after a great deal of consideration of their impact on the litigation process and the delivery of justice.

GAO Recommendations

The draft GAO report, which serves as the basis of this hearing, proposes senior

district judges and magistrate judges sharing policies that differ from those recommended by our Committee and endorsed by the Judicial Conference. The draft GAO report also proposes a sharing ratio for active district judges, a matter that our Committee is still working on. The GAO proposals – articulated in a scant seven pages – are based on two sources of information.

The first is a computer model of the FJC's study data that was developed for the GAO by a contractor with no apparent claim to any particular expertise in courts or the judicial system. As a result, the model does not reflect the reality of what happens in the courtroom or the litigation process. As with any type of modeling effort, the courtrooms model must be based on certain assumptions, the formulation of which requires a great deal of expertise and understanding of how courts actually work. Unfortunately, none of these assumptions were provided by the GAO in its report.

However, if the assumptions are based on GAO's understanding of the courts as expressed in its report, the assumptions used would be highly questionable. For example, GAO makes the assertion that "Although the judiciary uses weighted case filings as the measurement criteria for requesting additional judgeships this representation of higher level of activity does not translate into higher courtroom usage rates..." The FJC study shows, however, that greater than average courtroom use is correlated with higher pending caseloads and with being located on the border. GAO notes these findings, but suggests that "other courthouses in the same districts offset that higher use for district and senior district judges' courtrooms."

It is entirely unrealistic to say that all of the courtrooms in a district are fungible, no matter where they are located. Proceedings can't be easily transferred from one division to another to take advantage of a courtroom that may be available, sometimes hundreds of miles away. For example, in many districts it makes no sense to move a criminal trial to another division. Paying travel costs for the AUSA, AFPD, marshals, prisoners, court staff, not to mention witnesses, all out of taxpayer funds is not good stewardship. The same cost issues are also true in civil cases.

Another key assumption that may have radically affected the outcome of the modeling is noted in the appendix - that GAO's model assumes that every courtroom should be in use for ten hours every day. This is totally unrealistic and virtually impossible. It inflates the work day by 25%. This assumption is based on an incorrect understanding of the FJC report. The 8:00 a.m. to 6:00 p.m. time period noted in the FJC study was a "business day definition" for the limited purpose of giving direction to the data recorders, not to define the time period for expected courtroom usage. Federal employees of the court and DOJ are dedicated and may well work long hours on a regular basis, but jurors, litigants, witnesses, family members, and other parties would have trouble arranging their schedules for the extra hours and may have difficulties arranging for child care, or meeting other commitments that would be necessary if normal work hours of 8:00 a.m. to 6:00 p.m. are assumed. This assumption alone would have grossly distorted the resulting courtroom sharing ratios.

The second source of information used by the GAO to support its proposals are a

set of comments it elicited from a one-day confidential "panel" of individuals. GAO's characterization of the participants' comments, however, is questionable. First, GAO admits that the panel found courtroom sharing presented a number of different problems that would adversely affect the administration of justice. The report discounts judges' skepticism over long-term courtroom sharing, the disservice to the parties and the public of rescheduling an event due to lack of space, and the importance of having an available courtroom to encourage resolution of cases. According to these panelists, the district judges, clerk or court and practicing attorney present, were unanimous in the view that courtroom sharing is unworkable for the judiciary and would be a disservice to the public. The panel came to this conclusion despite the fact that the GAO was intimately involved in the selection and agenda for the group.

The GAO sharing proposals, based on their two extremely limited research efforts are that two courtrooms could be shared by three district judges, one courtroom could be shared three senior judges, and one courtroom could be shared by two magistrate judges. The GAO report favorably cites how one court centralized the assignment of courtrooms to facilitate sharing, implying that similar arrangements could work in other courthouses to overcome difficulties in sharing. It offers, however, no cost analysis for the court staffing needed to centralize the functionality; no analysis of the cost to parties in litigation of delayed and rescheduled proceedings; and no analysis of the cost to the Department of Justice's U.S. Marshals Service of transporting and locally housing criminal case defendants appearing at hearings that may not be held if courtroom space is not available.

The GAO report also incorrectly asserts that criminal hearings that currently take place in open court could instead be held via videoconferencing with the implication that this will reduce courtroom usage. This assertion does not address the fact that other participants in the hearing (i.e., the judge, the prosecutor, witnesses, family members and court reporter) would still convene in the courtroom to hold the hearing. Nor does it address the Constitutional rights of a defendant in criminal cases to have the hearing held in open court. As a result, I question the wisdom of basing courtroom planning assumptions which are premised on the waiver of a Constitutional right and inconsistent with the requirements of the federal rules and case law regarding the presence of the accused in the courtoom.

Finally, the GAO report acknowledges the need for collegiality and specific design characteristics to maximize the potential for sharing, but it appears that their computer-generated modeling system makes no accommodation for real-world situations where these factors may not be optimal. The predicable result: cases will be delayed, and litigants will be harmed.

Let me share with you – from a personal experience – why the quick and rudimentary modeling program employed by the GAO could produce disastrous results for the Judiciary.

Like every other judge, my experience does not represent a modeling or an average or a norm. Although I have occasionally gone through seasons with a light trial load, I have gone through a number of seasons with a heavy trial load. And if I am in trial at all,

my courtroom is not used 2.9 hours a day, it is for the entire day. In fact, I am in such a heavy season now; I have been in back-to-back trials for the last 7 months, and I know that my heavy trial load will continue until next year. I start a three-month trial in late September that I know will not settle, and immediately after the holidays, I will start another four-week trial.

Additionally, when we are in trial, whether it be a lengthy trial or more commonly a shorter trial, which is typically 5 days in length, our courtroom usage is often heavy because many of us schedule criminal hearings early, before trial begins, or later, after the trial day is over. We do this because there is no other way to abide by our many duties, under the Constitution, under the rules and by virtue of the values and traditions of this branch of government, to determine cases in a just, efficient and inexpensive manner.

I sit in a small courthouse. I am the only active district judge; there are one magistrate judge, two bankruptcy judges and two very active senior judges who handle caseloads that cause them to be in civil and criminal trials at the same rate as me. For this reason, I can tell you personally about sharing courtrooms. When I started, there were four district judges (myself and three seniors) for three courtrooms. And it was exceedingly difficult, because we all had trials. I had a particularly heavy load, but even with an average trial load it would have been difficult, because scheduling trials is an exceedingly complex enterprise. We would love someone to write an algorithm that really works, that recognizes human variables that we all experience. We schedule trials as early as possible, because we are competing for attorneys' availability with other courts. We

overlap scheduled trials, because, if we didn't, I for one would be giving civil cases trial dates in 2017 or 2018 instead of in 2011 and 2012. We try to estimate which cases will go and which will settle when we engage in this process of double, triple, multiple setting of cases. Sometimes our estimations are right, sometimes wrong.

We have courtrooms that aren't in use because the scheduled trial or trials settled. But this is unavoidable. For example, I will start a civil trial the first week of June. It is estimated to last 5 days. So, I have blocked out my courtroom for those five days. It would not be unusual for this case to settle. It may settle the morning of trial. Or, it may settle tomorrow. Even if it settles tomorrow, the chance that I could schedule another trial in that space is minimal. Parties need notice. Their attorneys have other matters scheduled. Witnesses come from across the country. We simply cannot expect parties to go to trial on even two weeks notice, typically.

In a courtroom sharing scenario, particularly in a small or medium size courthouse, the result would be the same. For, despite our multiple stacking of trials, there comes a time, usually no later than 30 or 60 days before the trial, when the parties need to have a date they can bank on, one they put on their subpoenas. So, if my trial settles tomorrow, not only would it be too much to expect me to find a civil or criminal trial to schedule in that block of time on short notice, it would be too much to expect my fellow judges and all the parties involved in a trial to do so.

Judges are good stewards of the taxpayers money. But we also want to determine cases in a just, efficient and inexpensive manner. We see litigants, yes taxpayers, who are

almost bankrupted by the costs of litigation; many of our cases that go to trial involve individuals pursuing their civil rights or rights under Title VII (which involves cases based on employee discrimination); many other cases involve relatively small business entities for whom funding the costs of litigation as a plaintiff or a defendant is onerous and burdensome. Still others involve those accused of a crime, who bear the psychological costs if not the financial costs that come in fighting for one's liberty. An uninformed or hasty courtroom sharing policy will cause delay. It will increase costs. It will impair our ability to administer justice.

Conclusion

The key point I want to make is that our Committee and the Judicial Conference have taken our responsibility for examining courtroom utilization very seriously, and have made significant changes. Changes that many thought would never be considered by the federal courts. Adopting the recommendations of the GAO, which are based on flawed methodology, and a flawed understanding of the judicial process, would be a serious mistake that could have enormous and negative implications.

The Judiciary has made great strides in reducing its construction and rent costs by sharing. Just two years ago, the Judiciary was proposing to build one courtroom for every judge. Now, even before our Committee has completed its effort, the Judiciary has cut the number of requested courtrooms in courthouse projects. These recently enacted policy changes and our continued study of these matters are based on a thorough and considered

analysis of the data and its potential impact on the Judiciary's responsibility to provide an impartial forum in which criminal prosecutions and civil matters can be resolved in a "just, speedy, and inexpensive" manner. These changes reflect – as a computer modeled simulation simply cannot – the real-world experiences of litigants, parties, and judges who sit in these courtrooms regularly. They also take into account the legitimate concern of your subcommittee and all of us that the taxpayers' money be wisely spent. Fundamentally, we believe the policy changes we have adopted and are considering strike the correct balance between costs and ensuring a high quality of justice.

1. How did the Judicial Conference arrive at the sharing policy it has promulgated for magistrate judge courtrooms?

Answer: Three Committees of the Judicial Conference of the United States, the policy making body for the federal judiciary, considered the Federal Judicial Center's Study on *The Use of Courtrooms in U.S. District Courts, July 2008.* Specifically, the Committee on Court Administration and Case Management Committee, the Space and Facilities Committee, and the Committee on the Administration of the Magistrate Judges System met multiple times and considered what the appropriate ratio for magistrate judges to share courtrooms would be balancing the need to maintain the flexibility afforded to district courts to utilize magistrate judge resources to meet local needs with the ability to standardize space planning on a national basis. Further, the policy was promulgated to ensure the efficient use of courtrooms without sacrificing the availability of a magistrate judge's immediate access to a courtroom.

2. Can you explain why the Judicial Conference policy on magistrate courtroom sharing is two for one, only in courthouses with 3 or more magistrate judges, and only with the addition of a criminal duty courtroom, when the FJC data supports a straight forward 2 for 1 policy?

Answer: The Judicial Conference policy on magistrate judge courtroom sharing is two for one, with the addition of a courtroom for criminal duty proceedings, for all courthouses with three or more magistrate judges. A number of considerations were taken into account in formulating this policy.

First, the Conference concluded that courtroom sharing in locations that have one or two magistrate judges would cause substantial difficulty in the effective and efficient disposition of cases. Second, magistrate judges often require access to a courtroom for proceedings that are more likely to be shorter, unscheduled, and intermittent than the proceedings of active and senior district judges. Specifically, magistrate judges handle the majority of all criminal preliminary proceedings in federal court that are of this nature including, but not limited to, search and arrest warrants, arraignments, detention hearings, and preliminary examinations. For that reason, the Judicial Conference believes it is critical that a magistrate judge have immediate access to a courtroom when necessary to handle such criminal duty proceedings. Finally, magistrate judges are utilized to perform varying duties in civil cases throughout the country. The policy was designed to take into account the need for one magistrate judge at each location to have full access to a courtroom throughout the day for criminal duty proceedings, while maintaining courtroom access for other magistrate judges at that location for other civil and criminal pretrial and trial duties.

3. Can you tell me how many courthouses in the country have between 1 and 3 magistrate judges? Doesn't the Judicial Conference policy essentially mean that all of these courthouses will have 1 courtroom for each magistrate judge? So how far-reaching is your magistrate judge courtroom sharing policy? How many courthouses are actually affected?

Answer: As of September 2009, there were 224 locations with resident magistrate judges. Of these, 115 had one magistrate judge; 46 had two magistrate judges; and 63 had three or more

magistrate judges. Therefore, 63 locations are affected by the Judicial Conference policy, and any courthouse where a new magistrate judge position is being created will be affected if the location has two magistrate judges already in residence. The Judicial Conference believes that the policy it approved balances the need to maintain the flexibility afforded to district courts to utilize magistrate judge resources to meet local needs with the ability to standardize space planning on a national basis. Further, the policy was promulgated to ensure the efficient use of courtrooms without sacrificing the availability of a magistrate judge's immediate access to a courtroom.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

June 1, 2010

Mr. Mark L. Goldstein
Director, Physical Infrastructure Issues
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Dear Mr. Goldstein:

I write on behalf of the Federal Judiciary in response to the draft report entitled, *FEDERAL COURTHOUSE CONSTRUCTION: Better Planning, Oversight, and Courtroom Sharing Needed to Address Future Costs* (GAO-10-417). The Judiciary takes its stewardship responsibilities seriously and would welcome a fact-based and objective analysis as well as constructive suggestions for improving our facilities planning approach. It is regrettable at a time when the General Services Administration (GSA) and the Federal Judiciary are working closely and effectively to control courthouse costs – including current and planned courtroom-sharing measures adopted by the Judiciary – that GAO has produced a misinformed report that distorts both the current facilities planning process and prior projects.

In short, we have serious concerns about the accuracy of key data, the misleading way in which information is presented, and the soundness of methodologies employed to substantiate the draft report's conclusions. We emphatically dispute the draft report's contention that the 33 federal courthouses completed since 2000 have 3.56 million square feet of unnecessary and wasted space; and we have grave doubts about the validity and viability of the courtroom-sharing model developed by GAO.

We are also deeply troubled that the draft report issued by the GAO under strict disclosure restrictions was released to the public by GAO as its testimony to Congress on May 25, 2010, before Judiciary and GSA officials had provided comments. Additionally, after hearing GSA's and the Judiciary's testimony before the House Subcommittee on Economic Development, Public Buildings and Emergency Management of the Committee on Transportation and Infrastructure disputing key facts underlying the draft report's conclusions, you nevertheless discussed those conclusions on Federal News Radio.

This letter describes concerns related to those aspects of the draft report that pertain directly to the Federal Judiciary's programs and policies. A companion Judiciary response is enclosed in the form of a letter from the Honorable Loretta A. Preska, Chief Judge, United States District Court for the Southern District of New York. Chief Judge Preska's letter decries GAO's misleading characterization of her district's temporary experience with courtroom sharing as proof of the long-term efficacy of sharing by district judges (as asserted by GAO obliquely in the draft report and explicitly at the May 25 hearing); and it refutes the accuracy of the draft report's portrayal of an expert-panel discussion in which she participated. The draft report also covers important issues that are under the purview of the GSA, which will be responding separately.

We appreciate that the internal review process within GAO strives to ensure the objectivity and fairness of reports as well as the accuracy of facts and analyses. It is worrisome, however, that a senior member of the GAO audit team disclosed a predilection for a particular outcome when he told a group of Judiciary officials that more courtroom sharing would be coming and there would be no point in arguing against it. It appears that the audit team's zeal to meet certain objectives may have compromised its ability to be entirely objective and fair. It may be too late to change false impressions already generated by the premature disclosure and discussion of an unreviewed draft report, but it is not too late to make corrections and you expressed a willingness to do this during the May 25 hearing. We hope these comments will be helpful to GAO to produce a final product that will satisfy its high standards of quality, objectivity, and fairness. Primary issues are outlined below, followed by more detailed analysis.

- For the 33 courthouses studied by GAO, the Judiciary's courtroom policies in effect at that time were used to determine the number of courtrooms needed in each facility and these numbers were authorized by Congress. Those policies provided a courtroom for each judge. Auditors typically review actions and operations against the policies and rules in effect at the time. Instead, GAO has manufactured its own rules in the course of this study regarding how many courtrooms it thinks should be provided to judges, and it has applied these untested and unapproved rules retroactively to the 33 courthouses that were already built. The report attributes to this made-up concept 946,000 excess square feet.

- Because of GAO's retroactive application of its notion about courtroom sharing, this draft has defined as excess and wasted space courtrooms that currently are assigned to and used daily by federal judges. This is not reasonable.

- It is misleading to suggest that 887,000 extra square feet exist because of inaccurate estimates of judges for the 33 courthouses studied. GAO's snapshot approach to counting heads simply does not provide a complete picture. For example, the draft report supports its conclusion that the Judiciary's planning process overstates the need for judges by showing photographs of unassigned chambers' suites in the Coyle Courthouse in Fresno, California (on p. 29). The Eastern District of California is desperately in need of

additional judges. Its caseload per judge is the highest in the nation (with over 1000 cases per district judge, it has twice the national average caseload), and additional judgeships are currently pending approval by Congress. To suggest that those empty chambers are because of poor planning or are unneeded is absurd.

- The draft report focuses a great deal of attention on courtrooms, but nowhere in the report is a table indicating the numbers of courtrooms and judges in the courthouses studied. For a fact-based analysis of courtrooms, the absence of such vital data is surprising. The facts present a different picture than what has been suggested. Our analysis of facts (actual data on courtroom numbers, current judges, existing vacancies, soon-to-be vacant authorized positions, and pending new judgeships) indicates that for most of the 33 courthouses studied, either all courtrooms are assigned now, or they will be shortly or in the next few years. Moreover, these courthouses must suffice for many decades of occupancy.

- Based on the limited information provided about the simulation model, it is highly doubtful that GAO's courtroom-sharing model is sufficiently sound to be worthy of publishing, much less touted as an alternative to the carefully studied courtroom-sharing policies that have been promulgated over the last few years by the Judiciary. Running a simulation model for courtroom sharing requires making a large number of assumptions about case processing. It appears that the model was developed without the involvement of any experts in the judicial process and included some invalid assumptions. The draft report does not describe this model in the level of detail typically presented in research products to enable its assumptions and methods to be critically scrutinized. GAO has steadfastly refused to provide this information. Minutes after the May 25 hearing concluded, despite the Subcommittee's request that the GAO work collaboratively with the Judiciary and GSA and make available these assumptions, GAO pointedly refused to share them. If the model is well-grounded, why has GAO withheld this critical information?

- GAO has suggested that a one-day confidential meeting of an expert panel convened by GAO and the National Academy of Sciences helped to develop assumptions used for the simulation model. All of the Judiciary's participants in that panel have repudiated the representation of the panel discussion that appears in the draft report. A panel member's comprehensive and detailed critique is enclosed with this response.

- GAO's conclusions about feasible courtroom-sharing formulas do not appear to be supported by the source data. For example, courtroom-usage data provided by the Federal Judicial Center and used by GAO to develop the model showed that courtrooms in the top quartile of use during the study period had an average 6.6 hours of use per day. This level of usage would appear to leave approximately one hour free in a typical workday for other use. In a three-judge courthouse, for example, if the judges each

needed to use a courtroom for 6.6 hours each day but had to share one or two courtrooms as suggested by GAO, there clearly would be insufficient courtroom availability, and this would result in serious delays in the administration of justice.

Additional details about these and other issues are provided below.

Evolution of the Judiciary's Facilities Planning Process

The GAO report is critical of the Judiciary's planning process. Predicting what will happen in the future is, to say the least, challenging, and the GAO has recognized these challenges. A 1993 GAO report titled, *Federal Judiciary Space: Long-Range Planning Process Needs Revision* (GAO/GGD-93-132, Sept. 28, 1993), also noted that:

> *GAO recognizes that it is difficult to project future space needs with precision. The projection of such needs is not an exact science, and in the final analysis, it is reasonable to expect some variation between the estimate and what is actually needed. Space estimates are particularly challenging for the judiciary because there are numerous factors that cause changes in the workload, and therefore space needs, which are beyond its control.*

It can take upwards of 15-20 years from the time of initial planning to occupancy of new federal courthouses. During that time circumstances change: judgeship bills are not passed when anticipated, judges do not take senior status when planned, and judges retire or die. In addition, caseloads can fluctuate, prosecutorial policies change, and federal jurisdiction can expand – all impacting the workload of the federal courts. But once the decision is made to size a building based on a certain set of assumptions, it becomes very difficult and costly to change course mid-stream. To do so results in expensive change orders and a building that is not likely to meet longer-term needs.

The Judiciary was one of the first entities in government to establish a systematic approach to space and facilities planning. In the mid-1980s, the Judiciary began its formal facilities program to address problems associated with outdated and antiquated courthouses, the need for additional space to accommodate a growing Judiciary, and security issues. We have continued to improve and refine our space-planning process as additional data have been gathered and analyzed. Thus, the methodologies used in planning the courthouses studied by GAO have changed.

The Judiciary has been open to suggestions for improvements made by outside entities, and has adopted recommendations previously made by GAO and by private-sector consultants. Some of the improvements include use of multiple forecasting methods, review of the accuracy of the prior year's forecasts, and re-instituting the on-site planning sessions in each district and comprehensive facility evaluations of each courthouse. Perhaps most dramatically, the Judiciary

stopped its space planning process entirely in 2004 so that it could, once again, re-evaluate its planning methodology with a view toward cost containment. The Judicial Conference, the Judiciary's policymaking body, determined that the long-range planning process should be modified to ensure that the courts with the most urgent space needs were highlighted. The courts now employ a new long-range facilities management process known as Asset Management Planning to assess facilities needs on a go-forward basis. The process was developed as an objective methodology that identifies costs and benefits for alternative housing solutions such as renovating existing space. We have worked with the GSA to contain costs, including implementing cost controls for the approval of deviations from space standards.

Amount of Excess Space

The draft GAO report asserts that many courthouses have not been fully occupied and it suggests that what it then deems to be "excess" space constitutes a waste of funding. There are several reasons to question the validity of these conclusions. One key question concerns the number of courtrooms and judges in these facilities. We analyzed the 33 buildings identified by GAO and found that in most of these buildings, the number of courtrooms is either equal to the number of judges in the building, or will be equal to or be very close to the number of judges to be housed in the building once vacancies are filled and required new judgeships are approved. It also appears from the draft report that GAO did not always take into account congressionally authorized vacant judgeship positions in its analysis. The building sizes authorized by Congress assumed that vacant, congressionally authorized judgeship positions would be filled at these locations, that senior district judges and magistrate judges would not be sharing courtrooms, and that space would be provided for future new judgeship positions. It is more appropriate to apply the planning policies in place *at the time* to determine whether we met or came close to our projections.

Out of the 33 courthouses studied, GAO chose to highlight six (p. 28) to demonstrate what appear to be large differences between planned and actual numbers. It is not clear how GAO calculated the numbers in this table. To provide a much simpler and understandable assessment of whether there is excess space in these courthouses, we have produced a table below that indicates for each courthouse the number of district, magistrate and bankruptcy judges compared to the number of courtrooms for these judges. The table below shows a very different picture. All of the courtrooms in these facilities are expected to be assigned within the next few years, and in three of the six courthouses there will be fewer courtrooms than judges.

Number of District and Bankruptcy Judges & Courtrooms at GAO's Selected Courthouses (By 2016)

	Current Number of Judges & Vacancies	Pending New Judgeships Anticipated	Judges Eligible for Senior Status by 2016	Possible Number of Judges by 2016	Current Number of Courtrooms	Surplus/Deficit Number of Courtrooms by 2016
Bryant/ Prettyman CHs Washington, DC	24	0	9	33	27	(6)
Coyle CH, Fresno, CA	10	3	1	14	14	0
D'Amato CH Central Islip, NY	15	2	2	19	19	0
DeConcini CH Tucson, AZ	12	1	3	16	14	(2)
Eagleton CH St. Louis, MO	19	0	1	20	20	0
Ferguson/King Atkins CHs Miami, FL	25	1	7	33	27	(6)

Note: Our analysis includes all district, magistrate and bankruptcy judge types and authorized vacancies not covered by recalled judges.

There are factual corrections previously provided to GAO in response to a "Statement of Facts" that should be made. For example, GAO states (on p. 31) that the U.S. District Court for the District of Columbia had projected 14 senior judges by the end of the 10-year planning period. The correct projected number of senior district judges is 7. Also, GAO incorrectly reports that the district court currently has 9 fewer senior judges than estimated. The correct number is 1. Within the next 6 years, that district court will have 9 additional judges who will be eligible for senior status. On page 32, the draft reports an incorrect figure. There are 5 not 4 pending new district judgeships in the Eastern District of California.

As noted in the draft report, there are locations where we did not meet our projections. Several of these buildings were planned at the inception of our planning process – a process that has evolved over time. With the adoption of courtroom sharing policies for senior district judges and magistrate judges approved by the Judicial Conference in 2008 and 2009, many of these locations will now be able to support the operations of the Judiciary and the U.S. Marshals Service well beyond the initially planned 10-year time frame. It is misleading to say that the space is "extra" because of incorrect judge estimates. The space will be needed at some point in the near future. It may not be needed until the 12th year or the 14th year from the time design of the building started, but it will be needed.

The draft report charges that "the Judiciary's method of estimating judges does not account for uncertainty in when judges will take senior status and in how many new judgeships will be authorized." To account accurately for "uncertainty" would seem to be an oxymoron. The draft report states that the Judiciary's estimates were based on "unsupported assumptions about the amount of time it would take to obtain authorizations for new judgeships." This is false. When the courthouses studied by GAO were planned, Congress regularly enacted new judgeship legislation. In fact, up until 1990, Congress had passed comprehensive judgeship legislation about every six years, including 1978, 1984, and 1990. These bills added hundreds of new judgeships to the courts, and this history formed a reasonable basis for the planning assumptions. Likewise, history regarding when eligible judges, on average, tended to take senior status formed the basis for the planning assumptions.

Although Congress has not passed regular comprehensive judgeship legislation in recent years, in the past two decades, the Judiciary has gained 103 district judgeships, 61 bankruptcy judges, and 210 magistrate judges. The draft GAO report criticizes the Judiciary for continuing to plan space for new judgeships – however, if Congress had enacted our requests, as they had historically done, and we had *not* planned chambers and courtrooms for these judges, there would have been a critical shortfall of space around the country.

The draft report incorrectly characterizes space provided for visiting judges by stating that it is a way of building "extra" space (p. 30). In smaller courts with few judges, it is not unusual to have all the Article III judges recuse themselves because of a connection or conflict with one of the parties. In other courts, judges are assigned from other districts or circuits to assist with a surge in workload. And, in some courts, judges travel from one division within a district to another because there are not enough judges at any one location to handle the caseload. When these circumstances exist, smaller chambers and sometimes a courtroom dedicated to use by visiting judges is provided. Characterizing this space as "extra" space because it is not assigned to a specific judge demonstrates a fundamental misunderstanding of how the judicial system operates at some locations.

We are sensitive to the costs of constructing courthouses, and we are willing to consider reasonable changes to our planning assumptions to reduce the risk of significant over-projections of future needs. Failing to take into account requested judgeships that are already needed because of existing caseload, but that have not yet been authorized by Congress, would be imprudent. Most courthouses are occupied for many decades. To employ a planning process that could never result in unassigned space would be extremely shortsighted, would risk having inadequate capacity to house needed judges and staff for the future, and would therefore reduce the useful life of these courthouses.

Courtroom Sharing

The Judicial Conference has adopted several significant policy changes that included a policy to provide one courtroom for every two senior judges, and a policy to provide one courtroom for every two magistrate judges. In addition, a courtroom usage study of bankruptcy courts is currently underway and after a determination is made regarding the bankruptcy courts, the Judiciary will consider a courtroom sharing policy for courthouses with more than 10 active district judges. These are major changes to the courtroom allocation policies for the Federal Judiciary, which were made only after a great deal of consideration of their impact on the litigation process and the delivery of justice.

While these policies were not in effect at the time the 33 courthouses were planned, the Judiciary now applies its courtroom-sharing policies to new planning efforts. These policies will result in substantial cost savings. The draft GAO report proposes senior district judges and magistrate judges sharing policies that differ from those endorsed by the Judicial Conference. The draft GAO report also proposes a sharing ratio for active district judges, a matter that the Judiciary is still working on. The report provides practically no information about the assumptions used to produce these results and nothing to support the contention that a single ratio could apply in districts of all sizes. Experience demonstrates that this cannot possibly work.

The GAO proposals – articulated in a scant seven pages – are based on two sources of information. One source is interviews of court officials and an expert panel convened by GAO and the National Academy of Sciences, which included federal judges and a court clerk who had experience with courtroom sharing. GAO mischaracterizes many of the participants' comments. For example, the draft asserts that a district court official said that "indicators of courthouse efficiency . . . increased when the judges of the court were sharing." As noted in the enclosed comments from Chief Judge Loretta A. Preska, this statement is completely contrary to what was said. Chief Judge Preska's letter contains numerous examples of GAO's misrepresentation of the panelists' views and GAO's interviews in that district court.

The other source of information is a computer model of the Federal Judicial Center's study data that was developed for the GAO by a contractor with no apparent claim to any particular expertise in courts or the judicial system. As a result, the model does not reflect the reality of what happens in the courtroom or the litigation process. As with any type of modeling effort, the courtroom model must be based on certain assumptions, the formulation of which requires significant expertise and understanding of how courts actually work, and the consideration of possible impacts on litigants, parties, jurors and judges. The only key assumption identified by GAO in its report that may have radically affected the outcome of the modeling is noted in the appendix, i.e., that every courtroom should be in use for 10 hours every day. This is unrealistic and virtually impossible. It inflates the work day by 25 percent.

Federal employees of the court and DOJ are dedicated and may well work long hours on a regular basis, but jurors, litigants, witnesses, family members, and other parties would have

trouble arranging their schedules for the extra hours and may have difficulties arranging for child care, or meeting other commitments that would be necessary if normal work hours of 8:00 a.m. to 6:00 p.m. are assumed. This 10-hour-a-day assumption alone would have grossly distorted the resulting courtroom sharing ratios. The draft report also contains incorrect statements about trials (p. 42). Average trials per judge in 2008 were 20 trials.[1] The median length of a trial was 3 days.[2]

A courtroom is not simply a facility but an essential tool for the delivery of justice. The application of courtroom usage data to construct a simulation model may give the appearance of authentic analysis, but the approach has serious logical and conceptual flaws, primarily through what appears to be simplistic and unrealistic assumptions. An assessment of the need for courtrooms was completed by Ernst & Young in 2000 as part of an *Independent Assessment of the Judiciary's Space and Facilities Program.* That report noted:

> *Planning for courtrooms and the impact of courtroom sharing is more complex than a simple assessment of actual courtroom use would indicate. Understanding the dynamics of the judicial process is fundamental to any attempt to anticipate courtroom needs accurately and to use courtrooms effectively.*

In describing factors that affect courtroom usage and needs, the 2000 Ernst & Young study concluded that it would be wrong to assume that all of the hours spent by judges in a courthouse can be perfectly redistributed across fewer courtrooms without adding a generous allowance for flexibility. They indicated that such a factor is needed because scheduling full utilization of courtrooms would require conditions that do not exist in the judicial environment, namely, greater certainty that scheduled events will occur; greater certainty about event duration; adequate notice of all events; and the ability to reschedule events to fill open courtroom time.

As noted by Ernst &Young, it would be a false premise to assume that judicial events are largely knowable and predictable. They are not. It is one thing to plug into a mathematical model statistics about events that have already occurred, but it is another matter altogether to predict the duration of these events in advance. This would be difficult, even for experts, because of the inherent variability and uncertain nature of the judicial process. Trial times can range significantly in length, and juries may deliberate for minutes or many days. Not only is the duration of many proceedings unpredictable, but only in a simulation model and not in reality can a suddenly available courtroom be readily used for another case. After the fact, one may know

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[1]Administrative Office of the United States Courts. *2008 Federal Court Management Statistics*, Washington, D.C., March 2009.

[2]Administrative Office of the United States Courts. *2008 Annual Report of the Director: Judicial Business of the United States Courts*, Washington, D.C.: U.S. Government Printing Office, 2009.

that a case concluded at noon and the courtroom was free in the afternoon, but how foreseeable was that circumstance? Perhaps it could have been foreseen the day before, but probably not a month earlier. An average trial for a particular type of case may take three or four days, but others will not. There is considerable variability. A 1998 study by the National Center for State Courts entitled *On Trial: the Length of Civil and Criminal Trials*, demonstrated there were substantial differences in experienced state court judges' and attorneys' estimates of trial length compared to the actual length of the trials.

The draft report does not describe in any sufficient detail the methodology and assumptions used to determine its recommended ratio of judges to courtrooms. GAO did not provide the draft report to the Federal Judicial Center, which is the Judiciary's research and education entity, although GAO used the Federal Judicial Center's data to develop its simulation model. After review of GAO's draft report, the Federal Judicial Center has provided the following response:

The GAO's draft report provides little or no information about most of the model elements....Thus, there is not enough information or details about the simulation model, in general, or about the components of the simulation, in particular, to allow the Center to make a constructive technical assessment of the GAO's efforts to model and simulate courtroom use in the district courts. It is possible, however, to identify instances where this lack of detail raises questions about the completeness and adaptability of the model and therefore the ability of GAO's simulation to provide useful guidance for the judiciary.

- *According to the draft report (page 56 of Appendix I), the GAO used discrete event simulation techniques, such as those discussed above, to develop their simulation model of courtroom use. From the limited information the report provides about the simulation, however, it is difficult to determine exactly what elements were included in the GAO's model. It is unclear, for example, what entities were defined (e.g., case proceedings, sessions of court) and whether different types of entities were represented (e.g., were case proceedings differentiated into trials and hearings). Decisions made about the elements of the model are critical for the outcome of the modeling effort. The GAO report provides little information about those decisions.*

- *From the information given, it does not appear that the model included the concept of cases or a caseload, either as a specific entity of the model or as a parameter that could be varied in each simulation. If the model does not include cases and caseloads, then the simulation cannot estimate how changes in the model affect the time to disposition for individual cases or how changes in caseload affect courtroom use. The GAO report notes that the Center's study "... showed no correlation between the number of weighted and un-weighted cases filed in a courthouse and the amount of time courtrooms are in use" (page 36). The study did, however, show a statistically significant correlation between pending caseloads and courtroom use, suggesting that cases and caseloads are important elements of a model. (See the continuation of the Executive Summary table on page 4 of the Center's report.)*

- *The draft report notes that the model allowed for "...user input of the number and types of judges and courtrooms," (page 56) so it seems that both judges and courtrooms were identified as resources in the model. But it is not clear how the coordination of judge and courtroom availability was handled. In particular the report mentions that the model was "...based on scheduled courtroom availability on weekdays from 8 a.m. to 6 p.m." (page 56), but it does not mention what schedules were used for judges. It also doesn't mention if those hours of operation are typical for the federal courthouses they studied or what the results would be if a typical operating schedule of less than 10 hours per day were assumed (e.g., if 8 hours per day were used).*

- *The draft report does not provide details on what processing statistics were gathered during the simulation runs and only describes the output measures of the simulation broadly ("...the output states whether the utilization of the courtrooms does not exceed the availability of the courtrooms in the long run." (page 56)). It is unclear whether this means that all scheduled events were processed each day as expected, or if it implies that events were sometimes "bumped" from the day they were scheduled, but over the course of a week or a month all events were eventually processed. Whether events are processed on the same day as scheduled or over some longer period is an important distinction decision makers would want to take into account when determining the impact of changing the system.*

- *The draft report seems to imply that simulation runs were made for different courthouse configurations and that these runs resulted in different outcomes ("When using the model to determine the level of sharing possible at each courthouse..." (page 56)), but it provides no specific information about what those outcomes were. The report also recommends a single sharing configuration for each type of judge – e.g., 3 district judges to 2 district courtrooms – suggesting that level was sufficient in every modeled situation. The report does not, however, provide details that support a recommendation that a single ratio can apply in districts of all sizes.*

- *The draft report states that "The goal of the model was to determine how many courtrooms are required for courtroom utilization rates similar to that recorded by FJC." (page 56) The level of utilization it seems to be referring to is the average use of a courtroom per day based on actual use and unused scheduled time combined (e.g., 4.1 hours for courtrooms assigned to individual active district judges (page 35)) reported by the Center in our report on Courtroom Use. The average time per courtroom is not the only level of courtroom use that was reported for the Center's study, however. In particular, courtrooms in the upper quartile of use reported 6.6 hours per day on average. (See the Executive Summary table on page 3 of the Center's report on courtroom use.) The draft report does not appear to take into account the impact of a 3-to-2 courtroom sharing ratio in situations where use is different than the average level of use.*

- *The draft report describes GAO's efforts, with the assistance of the National Academy of Sciences, to assemble a panel of judicial experts to discuss the challenges to courtroom sharing (pages 40- 41). However, it does not appear that the expert panel had an opportunity to review the GAO's model assumptions, decisions about entities and resources, decisions about the processing statistics that should be collected and reported, and so on. In other words, it does not appear that the expert panel had an on-going role in development of the model.*

Conclusion

The Judiciary has already made great strides to reduce construction and rent costs. We understand that we must use limited resources wisely. The Judiciary and GSA will continue to work collaboratively as we plan new court facilities with an emphasis on cost and function. We will continue to look for ways to improve our planning methodologies. We welcome constructive and feasible recommendations from the GAO and will implement them as we have in the past. Also, the Judiciary will continue to examine seriously courtroom needs based on a thorough and considered analysis of data and its potential impact on the administration of justice and the Judiciary's responsibility to provide an impartial forum in which criminal prosecutions and civil cases can be resolved in a just, speedy, and inexpensive manner.

GAO should consider carefully the Judiciary's comments (including those of Chief Judge Preska and the Federal Judicial Center) as well as those to be provided by the General Services Administration, to make substantial, realistic, and informed modifications to the report.

Sincerely,

James C. Duff
Director

Enclosure

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LORETTA A. PRESKA
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June 1, 2010

Mr. Mark L. Goldstein
Director, Physical Infrastructure Issues
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Re: Federal Courthouse Construction Draft

Dear Mr. Goldstein:

Please accept this as a formal response to the draft report on Federal Courthouse Construction (GAO-10-417) (the "Draft"). I request that this letter be published in the final report. I participated in both the Government Accountability Office ("GAO") visit to my courthouse and the GAO/National Academy of Science panel discussion of September 14 on courtroom sharing ("Panel").

The Draft is disappointing in that it mis-characterizes, over-simplifies, and omits important parts of the discussions that took place at the Panel and at the meeting at the Moynihan Courthouse with the GAO and members of the Third Branch. That the Draft relies on those inaccuracies in reaching its conclusions is, I suggest, reason to reject those conclusions.

Panel of Experts

As noted above, I participated in the "panel" of experts held in Washington on September 14, 2009. I understand that the judiciary panelists were selected as experts because of our practical experience with courtroom sharing.

The Draft states as facts and relies on matters that, at least in this district, are demonstrably incorrect. The Draft states at page 42 that the median trial lasts one or two days. Using our district's jury statistics for the six-month period from November, 2009 to April, 2010, the median civil trial lasted four days, and the median criminal trial lasted seven days. The average civil trial lasted almost five-and-a-half days, and the average criminal trial lasted eight days. Indeed, trials in our district often last for weeks or months. Statistics aside, in my seventeen years experience as a trial judge, it takes a total of more than a full day to select a jury,

sum up and charge in the most simple criminal or civil case. Thus, the numbers relied on in the Draft allow no time at all for the taking of evidence in single-day jury cases and less than a day for the taking evidence in two-day jury cases. For both reasons, these supposed statistics about median trial length are demonstrably incorrect and thus provide adequate grounds for rejecting the Draft.

Even if these statistics were correct, the Draft oversimplifies the facts by implying that trials are the only use for courtrooms. It ignores conferences, oral arguments, evidentiary hearings, pleas and sentencings. It is beyond peradventure that all these non-trial activities, conducted in the courtroom, are necessary to the disposition of any case. The incorrect implication that these activities are not conducted in the courtroom infects the entire analysis of the Draft.

The Draft oversimplifies the disservice to the public of rescheduling court proceedings by saying only that it costs the public time and money (Draft at 41). While that is correct as far as it goes, it ignores the severe difficulty, discussed at the Panel, that rescheduling presents to our pro se litigants. Those litigants generally are not easily reachable for notification of the rescheduling and often must plan ahead to take a day off from work to attend court proceedings. Rescheduling on the short notice apparently contemplated by the "modeling techniques" employed by the Draft would likely result in litigants' not receiving timely notice and thus being required to take an additional day off. Unexpected changes in location of a proceeding, even if on the same day at the same time, would certainly result in pro se litigants' missing proceedings, causing delay of the case and increasing the amount of pay lost to litigants due to court appearances. On the criminal side, the Draft also omits the damage (discussed at the Panel) that such rescheduling would cause to transparency of criminal proceedings when a defendant's family and friends are prevented from witnessing a trial, plea or sentencing.

The supposed mitigating effect of "coordination . . . as long as people remain flexible and the lines of communication remain open" (Draft at 41) oversimplifies facts and ignores discussion at the Panel. It also reflects a lack of understanding (or, in light of the specific discussion at the Panel of these issues, a refusal to acknowledge) the realities of what district judges do. As discussed at the Panel, a great deal of time is expended in district judges' chambers attending to scheduling and rescheduling of proceedings. Indeed, that activity consumes much of the ordinary courtroom deputy's time—even without courtroom sharing. What is unmentioned in the Draft, however, is the unanimous view of the judges present at the Panel and at the Moynihan Courthouse meeting that the kind of scheduling coordination that would be necessary for substantial courtroom sharing would be entirely unworkable and would result in serious disservice to the judicial process and to the public we serve. While an easy palliative to invoke, the call for increased coordination (and the observation at page 41 that "court staff [in sharing arrangements] must work harder than in non-sharing arrangements to coordinate with judges and all involved parties to ensure that everyone is in the correct courtroom at the correct time") fails (or refuses) to acknowledge the opinion of the experienced judges in the trenches that it is easily said but impossible to achieve on a long term basis. It is also remarkable that factual information provided by a Clerk of Court on the Panel about the negative effect of courtroom sharing on case disposition times has been described in the Draft (at page 41) as an efficiency improvement. The Draft cites only those "facts" that support the

desired outcome and ignores the impossibility imposed by reality and brought to the drafters' attention by the judges who do this every day.

The supposed mitigating effect of technology discussed at page 43 misstates what was said at the Panel and relates "facts" that show a serious lack of understanding of what goes on in a trial in a district court. At the Panel, the participants discussed greater use of videoconferencing in non-jury matters as a way to save courthouse construction costs. For example, it was discussed that some courts have eliminated the need for an additional place of holding bankruptcy court by use of videoconferencing from a normal room in a remote location to the bankruptcy courthouse. The Panel mentioned, as does the Draft,[1] the cost savings associated with conferences, including Rule 16 conferences and other pretrial conferences with incarcerated parties (although these savings are in time and travel costs because these conferences also take place from the courtroom). So far, so good. The unremarkable observation in the Draft that "increased technology saves money; it expedites general processing because documents can be submitted to the court electronically" (at page 43) has nothing whatsoever to do with courtroom sharing. The final observation in the Draft on this topic (at page 43) is "Another judge said that if less money were spent on space, more could be spent on technological upgrades to increase flexibility and increase the ability to share space among judges." First, I do not recall hearing that comment, but, of course, it could have been made at a session I did not attend. Second, the comment is a meaningless non-sequitor. Third, and most importantly, by implying that technology will decrease courtroom usage, the Draft is seriously misleading. The Draft fails to mention that Rule 43 of the Rules of Criminal Procedure specifically requires that the defendant be present in the courtroom at the initial appearance, initial arraignment and every trial day. Indeed, in the Second Circuit, a plea and a sentencing NOT held in a courtroom (but in the adjacent robing room) were reversed. See United States v. Alcantara, 396 F.3d 189 (2d Cir. 2005). Thus, the technology section of the Draft is at least irrelevant and at worst misleading.

Discussion at the Moynihan Courthouse

The Draft states categorically that "judges with experience in sharing courtrooms said that they overcame the challenges when necessary and trials were never postponed because of sharing." I suggest that the authors are cherry-picking the facts here. For example, the reason my court, the Southern District of New York, was chosen for a site visit is that our court is currently engaged in limited courtroom sharing (about ten judges total) because of the on-going renovation of our second courthouse at Foley Square, the Thurgood Marshall Courthouse, with the resulting scarcity of courtrooms. Both at the Panel and during the interview GAO personnel conducted in New York with judges who are sharing (at which, as noted above, I was present), it was stated that this limited sharing is only workable because of collegiality, that is, the sharing pairs were carefully chosen for compatibility of workload and personality. While the Draft does

[1] On this topic, the Draft states:

"Technology makes certain conferences easier through the use of teleconferences and videoconferencing. One judge said that videoconferencing with a defendant who was being held in prison hundreds of miles away saved potentially thousands of dollars."
(Draft at 43).

mention the word "collegiality," stating at page 41 that "[j]udges that share courtrooms in one district also said that coordination is easier when there is a great deal of collegiality among judges," it omits the point made at the discussion in the Moynihan Courthouse. Perhaps the Draft is making reference to remarks made in some other district, but, even if it is, it fails to convey accurately the statements of judges in our district who actually do share courtrooms and the statement that I made at the Panel. The careful pairing of judges on which the temporary sharing in the Moynihan Courthouse is proceeding cannot be replicated in the widespread sharing urged in the Draft.

The Draft discusses alternating chambers with courtroom floors (Draft at 41–42) stating that such design "may be more conducive to collegiality and sharing." First, collegiality is not the issue here. Second, courtroom floors and chambers floors DO alternate in the Moynihan courthouse, and that has no effect on our view that courtroom sharing to the extent contemplated in the Draft is not a viable option among active judges and should be subject to local exemption for senior judges. While some designs might, in fact, be more conducive to courtroom sharing without unduly increasing security risks (for example, perimeter chambers around several courtrooms of varying sizes), alternating courtroom and chambers floors is not one of them. The observation that "this design breaks the apparent association of chambers with specific courtrooms without significantly increasing the distance from chambers to courtrooms" is simply irrelevant.

The Model

In support of its conclusion that "GAO's courtroom sharing model shows that there is sufficient unscheduled time for 3 district judges to share two courtrooms and 3 senior judges to share 1 courtroom" (Draft at 1), the Draft relies on a computer simulation model. In describing the creation of that Model, the Draft states:

> To create a simulation model, we contracted for the services of a firm with expertise in discrete events simulations modeling. This consulting engineering services and technology firm uses advanced computer modeling and visualization and other techniques to maximize throughput, improve system flow, and reduce capital and operating expenses. Working with the contractor, we discussed assumptions made for the inputs of the model and verified the output with in-house data experts. We designed this sharing model in conjunction with a specialist in discrete event simulation and the company that designed the simulation software to ensure that the model conformed to generally accepted simulation modeling standards and was reasonable for the federal court system. The model was also verified with the creator of the software to ensure proper use and model specification. Simulation is widely used in modeling any system where there is competition for scarce resources. The goal of the model was to determine how many courtrooms are required for courtroom utilization rates similar to that recorded by FJC. This determination is based on data for all courtroom use time collected by FJC, including time when the courtroom was scheduled to be used but the event was cancelled within 1 week of the scheduled date.

(Draft at 56.)

This description is, I suggest, merely gibberish and fails to inform the reader about precisely what assumptions were made and the method employed. To the extent that any assumptions are stated, the Draft states that it is "based on scheduled courtroom availability on weekdays from 8 a.m. to 6 p.m." (Draft at 56). First, these hours of operation are wholly unrealistic. Assuming that jurors would not be required to serve from 8 a.m. to 6 p.m., but only during a portion of that time, it is unrealistic to expect any juror to appear ready to start a trial by 8 a.m or to serve until 6 p.m. Many jurors have children who need to be attended to and cannot appear in Court by 8 a.m. or sit until 6 p.m.[2]

Assuming that the Model contemplates jury trials running in shifts, for example, 8 a.m. to 1 p.m. and 1 p.m. to 6 p.m., such shifts would close to double the time it takes to try any case, thus vastly increasing the cost to the litigants. There is already public outcry over the cost of litigation,[3] and doubling the cost of trial would be a severe injustice to the public we serve.

Finally, from the scant description of the Model presented in the Draft and from the conversation at the Panel, I infer that the Model assumes all court proceedings are the same in kind and manner. Such treatment is directly contrary to fact and, more importantly for these purposes, contrary to the specific discussion at the Panel. Participants of the Panel specifically stated that courtroom proceedings are not interchangeable, especially trials and other evidentiary proceedings. A preliminary injunction hearing, for example, is by definition of great urgency and ordinarily must proceed from day to day until complete. Also, considering all trials as portable—subject to movement from courtroom to courtroom—is inaccurate. Even the Draft acknowledges (at page 35) that some courtroom use involves attorney set-up and break-down time (although the Draft incorrectly considered this as an "[e]vent[] not related to case proceedings"). These days, almost all trials involve the presentation of some evidence by electronic means, and lawyers (more likely computer contractors) spend time in advance of trial setting up their equipment for presentation of evidence electronically and time after trial taking it down. Most trials also involve boxes of files and other materials that are stored in the courtroom or in the hall outside the courtroom for ready access by counsel throughout the trial. Counsel's need for electronic equipment for presentation of evidence and for access to hard copy materials cannot be accommodated when the courtroom changes during a trial.

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[2] In New York State Courts, jurors generally commence service between 8:30 and 9:00 a.m. and are generally dismissed between 4:00 and 4:30 p.m. The State Courts only draw jurors from a single county, however, while the SDNY draws jurors from eight counties, including from the cities of Poughkeepsie (85 miles) and Monticello (94 miles).

[3] See INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 17 (2010), *available at* http://www.du.edu/legalinstitute/form-chieflegal.html ("[A]n astonishing 97% of respondents responded that the system is 'too expensive,' with 78% expressing strong agreement.").

Conclusion

The authors of the Draft have not reported accurately the statements of even those they recognize as experts—the members of the Panel and the participants in the site visit to the Moynihan Courthouse. To the extent that the assumptions and techniques used in the modeling were disclosed, they are counter-factual, according to the same experts. Thus, the Draft is without foundation and, I suggest, should be rejected.

Moreover, the Draft relies on only one metric—efficiency. While efficiency is a fair factor to be considered, it is only one. Less susceptible to quantitative measurement, however, is a more important consideration—delivery of justice to the citizens of this country. I suggest that doing so in a user-friendly manner is inherently inefficient and thus that efficiency is only one of many factors to be considered.

Very truly yours,

Loretta A. Preska

Loretta A. Preska

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